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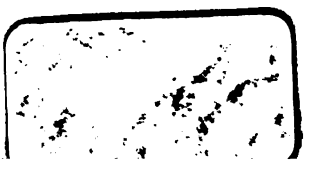

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REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench:

FROM

HILARY TERM, the 14th of GEORGE III. 1774,

TO

TRINITY TERM, the 18th of GEORGE III. 1778.

Both Inclusive.

By HENRY COWPER, Esq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

SECOND EDITION;

IN TWO VOLUMES.

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PREFACE

TO

THE FIRST EDITION.

TO begin, where ſo many examples teach us rather to end; to ſubmit the early labours of youth to a tribunal, from which ſome of the higheſt judicial characters have withheld the fruits of their experience, certainly appears to border upon imprudence, not to ſay, upon arrogance.

Senſible of the truth of this obſervation, it is with the utmoſt diffidence that I preſume to lay the following Work before the profeſſion: conſcious that it can deſerve little praiſe, and *barely* indulging a hope, that the anxiety I have felt in compiling it, may not be juſtified by an unfavourable reception, both by the bench and bar. If I have ever flattered myſelf with more than this, it has been from the encouragement of thoſe who firſt emboldened me to attempt ſo arduous an undertaking, and whoſe countenance has ſince induced me to perſevere.

Before I proceed to ſtate the plan I have purſued, it is but gratitude to the memory of the late Sir *James Burrow*, as well as a gratification to my own feelings, to acknowledge how much I am indebted to him for the peruſal of his papers, which, without any previous acquaintance, he offered, in the moſt obliging manner, to my uſe.

It is next to impoſſible, where there is a diverſity of opinions, to fix upon any plan that will be entirely free from objection: And there is, perhaps, no ſubject about which the profeſſion differ more, than the proper method

of reporting. It is almoſt of neceſſity therefore, that every one who engages in this ſpecies of publication, is left to his own choice. My great object has been, not to ſwell the work by unneceſſary length of pleading, or by a detail of the arguments delivered by counſel on each ſide: But to ſtate the former as conciſely, and to give the ſcope of the latter (one or two inſtances excepted), in as comprehenſive a manner, as the nature and importance of the ſubject would admit. Every omiſſion, therefore, muſt be laid to my charge alone; whilſt, on the other hand, it would be more than preſumption in me to ſuppoſe that any arrangement I have made of the ſubject matter, can do juſtice to the ingenuity and ability of thoſe who furniſhed it.

With reſpect to the judgment of the Court, I have endeavoured to be as faithful, accurate, and full, as the aſſiſtance of ſhort hand, and the moſt earneſt attention, could enable me to be. I would by no means, however, be underſtood to profeſs, that I have given more than the ſubſtance of what fell from the bench. If I have in any degree ſucceeded in doing that, ſo as not to incur their cenſure, I ſhall be more than recompenſed for the toil and anxiety neceſſarily attendant on ſuch an undertaking.

In a compilation of this ſort, in which a variety of legal topics have been nicely diſcriminated, and copiouſly diſcuſſed, it is impoſſible but that ſome miſtakes muſt occur to attentive and judicious obſervation: Yet, I truſt ſuch errors will be found to be trivial, or, at leaſt will appear ſo to the candour and liberality of the profeſſion, if the work ſhould be thought to deſerve a general character of authenticity.

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Page 318. line 27. *after* do *leave out* no
354. — 17. *for* ſhews *read* ſhew
371. — 20. for *ab libitum* read *ad libitum*
384. — 36. *for* ſtatutes *read* ſtatute
433. — 6. *for* plaintiff *read* plaintiffs
436. — 11. *for* objection *read* object
443. — 3 *from bottom, for* have *read* has
459. — 23. *after* in *inſert* a
478. — 7. *for* may *read* might
508. — 33. *for* the *read* they
550. — 25. *marg. for* where *read* were
562. — 2. *for* o her *read* other
805. — 10. *for* plaintiff *read* defendant
826. — 3 *from bottom, after* engine *inſert* a comma.

HILARY TERM

14 GEORGE III. *B. R.* 1774.

LEE *verſus* GANSEL.

Tueſday, 25th Jan.

THIS came before the court upon a rule to ſhew cauſe why the defendant ſhould not be diſcharged out of the cuſtody of the Warden of the *Fleet*; upon the ground of his having been illegally arreſted; that is, "that the Officer broke "into the apartment of the houſe where he *lodged*," and which he had rented by the year, for the ſpace of eight and twenty years before. The breaking open the door was poſitively ſworn to on the part of the defendant, and as poſitively denied by the officer; who ſwore, that the door was open, and that having got his thigh in, a ſtruggle enſued, in which, after a time, he prevailed, and then arreſted the defendant. The entrance of the officer into the houſe was at the *outer* door, and was admitted on all hands to have been peaceable and legal.

A bailiff, in execution of *meſne* proceſs, may break open the door of a *lodger's* apartment, having firſt gained peaceable entrance at the outer door of the houſe.

Mr. *Wallace*, Mr. *Bearcroft*, Mr. *T. Cowper*, and Mr. *Buller* ſhewed cauſe,

Firſt, It is neceſſary upon an application of this kind, for the defendant to make out a clear caſe, and to entitle himſelf to the diſcharge he claims beyond all controverſy or doubt. But here, the evidence is ſo contradictory as to leave him no caſe in point of fact; and if it did, the law is againſt him; which introduces the *ſecond* and the principal queſtion in the cauſe, "Whether "this lodging was the *dwelling-houſe* of the defendant, or "not?"

The caſes upon burglary are material to the diſcuſſion of this queſtion.

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In Lord *Hale, Hiſt. Plac. Cor.* 556. it is ſaid, that, "if *A.* "hires a chamber in the houſe of *B.* for a certain time, wherein "he lodgeth, and during the time contracted for it is broke "open, this is burglary; and the indictment ſhall ſuppoſe it to "be *domum manſionalem* of *A.*" But this is contradicted in many caſes; particularly in *Kelynge* 83. where it is expreſsly laid down, that, "As to an *inmate* who goeth in at the ſame door as the "owner of the houſe, he is in the nature of a *lodger*, and if his "chamber be broken open, it is burglary; but the indictment "muſt be laid for breaking the dwelling-houſe of *him* that *let* "it, and *not* of the *inmate*."

In the preſent caſe Mr. *Ganſel* is only an *inmate*, and therefore according to the above authority it cannot be ſaid to be his dwelling-houſe.

Again, at the *Old Bailey* ſeſſions after *Michaelmas* term 1701, it was held, *per Holt* Chief Juſtice, "That where *inmates* have "*ſeparate* rooms in a houſe, if they enter at the ſame *outer* door "as the *owner*, the rooms are *not* the *dwelling-houſe* of the "inmates, but of the *owner*."

Conſiſtent with the opinions of theſe two great men, is a deciſion as late as *Mich.* 13 *Geo.* 3. "One *Rogers* was indicted "for a burglary in the dwelling-houſe of *Chandler*, who rented "only a ſhop and parlour in it of the owner: The reſt of the "houſe was occupied by different inmates; the owner himſelf "inhabiting no part of it. It was objected, that the burglary "ought to have been laid in the manſion-houſe of the owner; "each apartment in it being occupied by inmates. But all "the Judges agreed that it was properly laid; elſe there would "be no ſecurity from burglary in ſuch a caſe: But they likewiſe "held, that, if the owner had inhabited any part, it would "have been clearly otherwiſe."

Theſe caſes by analogy ſhew, that the apartment in queſtion cannot be ſaid to be the dwelling-houſe of Mr. *Ganſel.*

But, *thirdly*; ſuppoſing it were his dwelling-houſe, though in ſuch caſe the bailiff ought not to break open the door, yet if he does, it will not invalidate the arreſt; for there are many caſes in which an arreſt may be good, though the conduct of the officer is not ſtrictly right in point of law. In ſupport of this was cited *Bro. Abr. tit. Execution pl.* 100. *tit. Treſp. pl.* 390.—18 *E.* 4. 4. where the ſheriff, upon a *fieri facias* awarded, broke open the houſe to take the goods. By

Littleton

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Littleton and the court; treſpaſs will lie for breaking the houſe, but the taking the goods was lawful. S. C. *Dalton's Sheriff*, *pag.* 350. This is an authority in point; and clearly proves that if it were the dwelling houſe of the defendant, it does not follow that the arreſt is illegal. Upon the whole therefore the defendant ought not to be diſcharged out of cuſtody.

An affidavit of *Lee* was offered to be read. Objected; that he ſtood convicted of perjury, and the conviction was produced.—But, *per* Lord *Mansfield*, a conviction upon a charge of perjury is not ſufficient, unleſs followed by a judgment; I know of no caſe, where a conviction alone has been an objection: Becauſe, upon a motion in arreſt of judgment, it may be quaſhed.

One convicted of perjury, is a *competent* witneſs, *before* judgment.

Mr. *Dunning*, Mr. *Mansfield*, Mr. *Cox*, and Mr. *Murphy* in ſupport of the rule.

The defendant was the *ſole* proprietor of this apartment; as ſuch, it was equally his *Caſtle*, in the legal ſenſe of that word, as if he had occupied the *whole* houſe; and he is equally intitled to protection in it. For the privilege which the law annexes to every man's houſe is the privilege of protection, and with that view, and in that ſenſe only, is a man's houſe ſaid "to be his "caſtle." The defendant in this caſe had no right to ſhut the *houſe* door; but he had a right to ſhut his *own* door; and if it might be broken open, what protection or what ſafety is there under ſuch circumſtances? It is therefore within the reaſon of the privilege, though there may be no direct caſe in point.

As to the caſes of burglary, it is clear that burglary may be committed in ſuch an apartment: The only doubt is, whoſe dwelling-houſe it ſhould be called? But upon civil proceſs neither a houſe nor lodging can be broken open.

The term *inmate*, cannot be applied to General *Ganſel*. In common acceptation it means *rogue*, *vagabond*, &c. it is not applicable to a perſon who hires a *diſtinct* apartment, unconnected with the *owner* of the houſe. This is as much a diſtinct property as the *chambers* of a college or of an inn of court, which have all one *common* entrance or fore-door: yet they are the *dwelling-houſes* of the different perſons who inhabit them. By parity of reaſon, a *lodging* is the *manſion* of the perſon who hires it: and ſo it is expreſsly laid down by Lord *Coke*, 3 *Inſt. fol.* 65. "A chamber or room, be it upper or lower, wherein "any perſon doth inhabit or dwell, is *Domus manſionalis* in

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" Law." If ſo, the officer had no right to break open this apartment in execution of meſne proceſs.

As to the *abuſe* of the proceſs being no ground for diſcharging the Defendant, it was anſwered, that in all caſes of privilege, the party arreſted is not left to ſeek his remedy by *action*; but the court does that which is the ſubſtantial Juſtice of the caſe, and places the Party in the ſame ſituation as if there had been no abuſe, or irregularity in the proceſs; and *ex parte Wilſon*, 1 *Atkyns* 152. was cited: *Wilſon* becoming bankrupt, a commiſſion iſſued; after which he was arreſted at the ſuit of the petitioning creditor; and being in cuſtody, was charged with another action at the ſuit of one *Waſs*. Upon petition to the Chancellor to be diſcharged out of cuſtody upon both actions, Lord *Hardwicke* ſaid, " Even at law where there is an irregular arreſt, and an " advantage is taken of the irregularity to charge the party in " cuſtody at the ſuit of another perſon, the court of law will " diſcharge him from both: and ordered the bankrupt to be " diſcharged accordingly."

Lord MANSFIELD ſaid, he had not much doubt at preſent, but it might be proper to look into the caſes, and alſo into ſome that had not been cited. *Curia adviſare vult.*

Afterwards, on *Thurſday* 27th *January* 1774, Lord *Mansfield* delivered the opinion of the court as follows:

This is an application on the part of General *Ganſel* to be diſcharged out of cuſtody on the following ground. That the proceſs iſſued againſt him by this court has been abuſed, and his perſon illegally arreſted; for that the officer *broke open* the *door* of his apartment which by law he could not do: therefore the court ought to diſcharge him, and put him in the ſame condition as before the arreſt.

To this charge *three* defences are ſet up on the part of the plaintiff in the action and of the officer complained againſt. The *firſt* is, that in fact the door was *not* broken open; but was previouſly *open*: and the officer having got part of his body, that is to ſay, his thigh in, after a ſtruggle to get in the reſt, in which he prevailed, arreſted the defendant. The *ſecond*, which goes to a denial of the whole ground of the application, is this; " That the *door* which was broken open, the officer had a right to " break open, due notice having been announced, and a refuſal " given." The *third* is, that ſuppoſing Mr. *Ganſel* founded in his application, as to the mode of the arreſt being illegal; yet his

his remedy is by action of *treſpaſs* for breaking open the door, or by the more ſummary mode of *attachment* againſt the officer; nevertheleſs, that the ſuppoſed treſpaſs upon his perſon is legal, for that the officer had a right to arreſt him.

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Theſe are the three defences; and as to the *firſt*, there is ſo great a contrariety of evidence, that there muſt be falſe ſwearing. I doubt therefore where the truth lies: and ſuppoſing the fact contended for on the part of the plaintiff in the action to be true, I doubt as to the conſequence: that is, if an actual breaking open of the door were illegal, I doubt as to the law, where a door being *partly* open is *ſhut* by the perſon who is within, againſt the officer who is ſtruggling to get entrance, I doubt both as to the fact and the conſequence; and therefore lay that entirely out of the caſe.

The *ſecond* ground of defence and which makes the next queſtion in this caſe is, Whether *this* door might be *lawfully broken* open in execution of meſne proceſs? And as to that, the caſe is this. Mr. *Mayo* was *owner* of this houſe, in which General *Ganſel* had at the time in queſtion, and for a long time before, taken the firſt floor which conſiſted of two rooms, each of which had a door that opened upon the ſtaircaſe; he had likewiſe up two pair of ſtairs, two rooms, each of which had a door that opened in the ſame manner: he had the uſe of the kitchen beſides, and he rented theſe ſeveral apartments as a *lodger* from *year* to *year*, though that circumſtance makes no difference. Mr. *Mayo lived* in the houſe; and, which is the *material* part of the caſe, there is but *one outer door* to the houſe; at which Mr. *Mayo* enters to go to his apartment, and Mr. *Ganſel* to go to his. This is a fact concerning which there is no controverſy. Mr. *Ganſel* was up two pair of ſtairs in his bed-chamber, and as he ſays, the door was locked; and that after notice the officers broke it open; though nothing turns upon the notice or mode of breaking. The queſtion is, "Whether by law this door could "be broken open,

I ſhould firſt ſtate however, that the *outer* door of the *houſe* was *open*, and that the officers entered there legally. The queſtion therefore turns upon the ſubſequent breaking open of the bed-chamber door.

The books talk of the *privilege* of a *manſion-houſe* and of the privilege of the *door* of it, which cannot be broken open. The whole queſtion will therefore turn upon the *extent* of that

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which is called *privilege*. Now this rule of privilege, ariſing from a ſound maxim of *policy*, is no privilege of a *debtor* properly ſpeaking who abſconds from juſtice in avoidance of legal proceſs; but is annexed to the *houſe* and *door* (to which door I forbear at preſent to give any particular epithet) for the *protection* of a man and his family. It is therefore by conſequence only, that the privilege is a protection to ſuch a perſon, and not for his own ſake. The ſound maxim of policy is this, "*that a greater evil* "*ſhould be avoided for a leſs, and that a leſs good ſhould give way* "*to a greater.*" The *outer* door therefore or window of a man's houſe, ſays the law, ſhall *not* be *broken* open by proceſs. This has been long and well underſtood. The ground of it is this; that otherwiſe the conſequences would be fatal: for it would leave the family within, naked and expoſed to thieves and robbers. It is much better therefore, ſays the law, that you ſhould wait for another opportunity, than do an act of violence, which may probably be attended with ſuch dangerous conſequences. But as this is a maxim of law in reſpect of political juſtice, and makes no part of the privilege of a debtor himſelf, it is to be taken *ſtrictly*, and not to be extended by any equitable analogous interpretation.

The oldeſt caſe to be found in the books that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a caſe in the year-book 18 *Ed.* 4. *page* 4. *pl.* 19. "There, an action of treſpaſs was brought for *breaking* "the *outer* door in execution of a *fieri facias*. The court held, "that treſpaſs would lie, for the officer ſhall *not break* open an "*outer* door to execute his proceſs: but when the officer had "ſo got in, he *broke* open a *trunk*, and took out the goods that "were in it; in reſpect of which they held, that treſpaſs would "not lie; for he had a right to break the trunk, and take the "goods." I quote this caſe not to imply that I ſhould perhaps have been of the ſame opinion myſelf in a caſe of the firſt impreſſion; but to ſhew, that the rule of privilege is taken moſt *rigidly*. Afterwards, in *Semaine*'s caſe, 5 *Co. Mich.* 2 *Jac. page* 93. the ſame ſtrict doctrine was held, namely, "that "breaking open the *outer* door was a treſpaſs, but that taking "away the goods was lawful." In *Yelverton, Mich.* 44. *El.* 29. which was the ſame caſe, *Popham* doubted whether *even* the *outer* door was privileged, becauſe it would be a hindrance to juſtice: but afterwards, in *Mich.* 2 *Jac.* 5 *Co.* 92. *b.* 93. *a.*

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the whole court held, "that the *outer* door ought not to be "*broken open*"; and grounded their opinion upon the ſingle authority of 18 *Ed.* 4. *p.* 4. *pl.* 19. before quoted. You ſee from hence with what *rigour* the privilege has been conſtrued in the oldeſt caſes.

But no caſe or dictum has been cited at the bar, nor indeed did there ever exiſt a caſe, which intimated a doubt whether an *inner* door might *not* be *broken* open. In *Hob.* 62. and 263. among other outrageous things the bailiff broke open a chamber door, having entered legally at the outer door; but ſuch breaking was held lawful, the firſt entrance at the outer door which was open, having been legal: and yet the latter was a very harſh caſe, for they broke in when the man and his wife were in bed, and behaved with great violence and outrage. But I lay ſtreſs on this to ſhew how *ſtrictly* the privilege has been underſtood, when the *outer* door or *window* is ſecure, and when the entrance has not been forcible through either of them, ſo as to lay open the houſe and its inhabitants to inſult and violence from without; but on the contrary has been quiet and peaceable. In addition to theſe authorities, I recollect a note of a caſe lately determined, which ſays, "an *inner* door has *no* protection at all." It was the caſe of *Aſtley* and *Pindar*, and was heard in the year 1760, *Mich.* 1 *Geo.* 3. There, all the other charges againſt the bailiffs were anſwered, except breaking the *inner* door, which was accompanied with ſuch violence, that the door fell, and the officer with it into the room: but all the court were of opinion, that the officers having lawfully entered at the *outer* door, might break open the *inner* to execute the duty of their office. Beſides theſe caſes, and in conformity to the principles upon which they have gone, I ſhall cite a very ſenſible and material diſtinction from a book in my hands, which is *Foſter* C. L. title *Homicide*, *c.* 8. *ſect.* 20. which is this. "The rule that every man's houſe "is his caſtle, when applied to arreſts on legal proceſs, has been "carried as far as political juſtice will warrant, and perhaps "further than in the ſcale of reaſon and ſound policy they will "warrant. But in caſes of life we muſt adhere to rules well "known and eſtabliſhed. But this rule is not one of thoſe "that will admit of any *extenſion*. It muſt, therefore, as I have "before hinted, be confined to the breach of windows and of "outer doors intended for the ſecurity of the houſe againſt "perſons from without, endeavouring to break in."

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" for and in *conſideration* of the natural *love* and *affection* which " he hath to his *name*, *blood*, and *family* and for ſettling and ſe- " curing the *one undivided moieties* of the manors, caſtles, towns, " lands, tenements, and hereditaments hereinafter mentioned, " in his name, blood, and family, ſubject to the payment of his " debts, *&c.* and in conſideration of five ſhillings to him by the " ſaid *Robert Dillon* in hand paid, *&c.* he the ſaid *Michael* " *Moore* HATH granted, *&c.* and by theſe preſents DOTH " grant, *&c.* the *one undivided moieties* of all that and thoſe " the manors, caſtles, towns, lands, tenements, and heredita- " ments following, that is to ſay,—Here the deed deſcribes every part and parcel of the undivided moiety in the county of *Mayo*. — " As alſo all that," — Here the deed as minutely deſcribes the undivided moiety in *King's County*: and proceeds as follows. " Together with *all other* the ſaid *Michael Moore's* " *lands*, tenements and hereditaments *in the kingdom of Ireland*. " TO HAVE and to HOLD the ſaid undivided moieties of the ſaid " manors, caſtles, towns, lands, tenements and premiſes, herein " before granted, or intended to be granted, with their and every " of their rights, members and appurtenances, together with *all* " *other* the ſaid *Michael Moore's eſtate* in the kingdom of *Ireland*, " unto the ſaid *Robert Dillon* and his heirs, to the ſeveral *uſes*, " intents and purpoſes *herein after declared*, limited, and appoint- " ed, and to and for *no other uſe*, intent or purpoſe whatſoever; " that is to ſay, as for and concerning the one undivided moiety " of the ſaid lands and premiſſes lying and being in the county of " *Mayo*, to the uſe and behoof of the ſaid *Michael Moore* and " his heirs for the payment of debts, remainder to himſelf in " tail, remainder to *Garret Moore* for life, remainder to the " firſt and other ſons of *Garret Moore* in ſtrict ſettlement, re- " mainder to fourteen perſons of the name of *Moore*, his brothers " and couſins ſucceſſively in tail-male remainder to his own " right heirs." The like uſes are repeated and declared reſpecting the undivided moiety in *King's County*, except that a term of 500 years is given to *Roſs Mahon* for the purpoſe of ſecuring a jointure of 200 *l.* a year, to *Francis Moore* his wife; and to raiſe the ſum of 1500 *l.* for his daughters portions.

" That on the 25th of *March* 1743, *Michael Moore* died leaving " *Mary Moore*, now *Mary Concannon*, one of the leſſors of the " plaintiff in ejectment, and *Francis Moore*, his co-heirs at law.

" That in *Trinity* term 1755, *Garrett* levied a fine and ſuffered " a recovery of the *Roſcommon* eſtate to himſelf in fee: and died

" on

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" on the 4th of *February* 1767, without iſſue: Upon his " death, *Edmond Moore* entered; and by leaſe and releaſe, 28th " and 29th of *June* 1768, conveyed the premiſſes to *Luke Dillon*, " to the uſe of himſelf in tail-male; remainder to *John Moore* " for life, remainder to his firſt and other ſons in ſtrict ſettle- " ment. That *John* being in the *French* ſervice, was by " decree in the *Exchequer*, held to be diſabled under ſtatute " 19 *Geo.* 2. to hold the ſaid eſtate, and his intereſt was decreed " to *William Biggen* as the firſt informer, who aſſigned the ſame " to *Garret* the defendant in ejectment, who entered on the 12th " of *April* 1771."

Upon this ſpecial verdict, the court of *King's Bench* in *Ireland* gave judgment for the plaintiff; which was entered upon the record as follows: " Therefore, it is conſidered that the ſaid " *John Magrath* do recover againſt the ſaid *Garret Moore* his " ſaid ſeveral terms yet, *&c.* in the ſaid demiſed premiſſes," *&c.*

For the plaintiff in error, *Obj.* 1ſt. It is not ſtated upon the record that the defendant is *guilty:* therefore there is no verdict, and conſequently there can be no judgment.—*Reſp.* In ſubſtance, the defendant is found guilty: for it is implied, in ſaying, " that the plaintiff ſhall recover the pre- " miſſes:" the judgment therefore is merely informal, and may be amended.

Obj. 2dly. The plaintiff has no right to recover; for it was clearly the intention of the donor to include, under the geheral ſweeping clauſe in the deed, the whole of his eſtates in *Ireland* not before diſpoſed of, and to ſettle them to the ſame uſes as he had declared reſpecting the two undivided moieties.—*Reſp.* His intention was only to ſettle the undivided moieties, and the preamble takes notice of nothing elſe; therefore, if the intention is to govern, the lands in queſtion did not paſs by the ſweeping clauſe. But ſuppoſing they did, no *uſe* is declared of them: Therefore they reſult to the donor; and conſequently the leſſors of the plaintiff are well entitled. *Strong* verſus *Teat*, 2 *Bur.* 912.

Lord *Mansfield.* I am very clear. It might be plainer with the deed: but, without ſeeing the deed, it is plain enough.

This gentleman was ſeiſed of an eſtate in right of his wife, which conſiſted of an undivided moiety of lands in the county of *Mayo*, and of another undivided moiety of lands in *King's County:* He was likewiſe ſeiſed of a paternal eſtate in three other counties; and

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and his ſeat and reſidence, at the time of making the deed in queſtion, was upon his paternal eſtate, the lands in diſpute.

Two queſtions ariſe; and the determination of either is ſufficient.

1ſt, Whether upon the true conſtruction of this deed the donor has ſettled his paternal eſtate? If he has, that has conveyed it to Mr. *Dillon*.

2dly, Whether he has declared any uſe of it? If he has not, it muſt reſult to himſelf: for the declaration being that the eſtate ſhould be to ſuch uſes as were *declared*, and *no other*, unleſs he has declared ſome uſe, there is no diſpoſal of it: and in order to diſinherit an heir at law, a man muſt give his eſtate to ſomebody elſe.

With reſpect to the firſt point, it ſtrikes me very ſtrongly, that being ſeiſed of a paternal eſtate, and an eſtate in right of his wife, it was reaſonable he ſhould not ſettle both; and I believe there was ſome private motive for his ſettling the one in preference to the other; but not ſeeing the deed we are at a loſs.

I am of opinion that he never had an idea of conveying any part of theſe lands by the deed of 1742, though, by the blunder of the drawer, he may have uſed words that might extend to them.

The deed begins with the preamble uſual in all ſettlements; that is, by reciting what it is that the grantor intends to do; and that, like the preamble to an act of parliament, is the *key* to what comes afterwards. Now the preamble does not mention a word of his paternal eſtate: whereas, if it had been his intention to ſettle that, would he not have added after the word "moieties" words to the effect following, and alſo *all* other his lands, *&c.* in the kingdom of *Ireland?* It is ſcarcely poſſible, if he had an idea of including his paternal eſtate in the ſettlement, that he ſhould recite his intention of ſettling the one, and be totally ſilent as to the other. Again the deed goes on, with much tautology, to deſcribe every part of each of the undivided moieties, moſt minutely and particularly: Would he do that, with an intention of paſſing his *paternal* eſtate by the ſame deed, and make no deſcription of it at all? It is very common to put in a ſweeping clauſe; and the uſe and object of it in general is, to guard againſt any accidental omiſſion: but in ſuch caſes, it is meant to refer to eſtates or things of the ſame nature and deſcription with thoſe that have been already mentioned. I am therefore of

opinion from the words of the preamble, that the donor did not intend to include his paternal eſtate: and it is more than probable that the drawer by miſtake omitted inſerting the two counties before the words "in the kingdom of *Ireland*."

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MOORE *verſus* MAGRATH.

The ſecond queſtion is, "Whether any uſe is declared of the "ſweeping clauſe?"

Now though he has minutely deſcribed the uſes of the undivided moieties, he certainly has not declared any one uſe or limitation of the ſweeping clauſe. This circumſtance alone is a ſtrong argument in favour of the conſtruction which the court inclines to upon the firſt point. But nothing can be ſo clear, as that this eſtate muſt reſult to the heir, ſince no uſe is declared of it.

Mr. Juſtice *Aſton*, M. Juſtice *Willes*, and Mr. Juſtice *Aſhburſt* concurred.

Per Cur. judgment affirmed.

REX *verſus* GENGE.

Saturday, Feb. 5th.

THE defendant was indicted, for that he at a court leet, holden in and for the hundred of *Whitchurch* in the county of *Dorſet*, was, by the jury of the court, elected conſtable of the hundred; that he was a reſiant and liable to ſerve the office, and had notice of his election; that the ſteward certified in writing to all juſtices, *&c.* that the defendant was elected conſtable; but was not preſent nor was ſworn; and that the defendant afterwards was ſummoned to appear before a juſtice of peace to take the oath of office, but he had refuſed to be ſworn into, or to execute the office. The defendant pleaded the general iſſue; and the indictment was tried at the laſt aſſizes at *Dorcheſter*, when the jury found a ſpecial verdict, ſtating in ſubſtance as follows:

One who is a reſiant within a *private leet*, within the *hundred*, is not therefore exempt from ſerving the office of *conſtable* of the *hundred*: And a *cuſtom* to elect ſuch a one conſtable is *good*.

'That *from time whereof the memory of man was not to the contrary*, there had been and was a *court leet*, within and for the *hundred* of *Whitchurch*. That at ſuch court leet, two perſons being *reſiants* within the hundred, from time whereof the memory of man is not to the contrary, have, by the jury ſworn at ſuch court leet, been annually choſen to ſerve the office of *conſtables* of the ſaid *hundred*.—That the manor of *Wootton Abbots* extends into and comprehends *two tythings* and no more; one of which tythings, *from time whereof the memory of man is not to the contrary*, hath been and is within the hundred

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dred of *Whitchurch*; the other within and parcel of another hundred.—That, from time whereof the memory of man is not to the contrary, there hath been and is a court leet within the manor of *Wootton Abbots*, at which court, the reſiants within the ſaid two tythings from time whereof, &c. have done ſuit and ſervice, and have been choſen tything-men of the ſaid tythings. That there have been, *time out of mind*, and yet are eighteen other tythings, within the ſaid hundred; and the reſiants of thoſe tythings, *from time whereof*, &c. have done ſuit and ſervice at the *court leet* of the *hundred*; and ſerved as jurymen there, and been *eligible*, *elected*, and *ſerved* as *conſtables* of the *hundred*: And that for twelve of the ſaid eighteen tythings, reſiants therein from time whereof, &c. have annually been choſen in the court leet of the hundred to be tything-men.—That by *ancient cuſtom* the *reſiants* of the *tything* of *Wootton Abbots* have been *choſen* and *ſerved* as jurymen in the leet of the hundred; and have been *elected* by the jury of the *court-leet* of the hundred to be *conſtables* of the *hundred*, and have by ſuch *ancient cuſtom ſerved* as ſuch. That the defendant at a court leet holden, &c. for the hundred, was elected conſtable of the *hundred*, but not being preſent, the ſteward made his certificate, &c. &c. *prout* the indictment.' The queſtion, for the opinion of the court upon this ſpecial verdict, was, whether the defendant was exempt from ſerving the office of *conſtable* of the *hundred* of *Whitchurch* by reaſon of his then being a *reſiant*, and an inhabitant of and within the *tything* of *Wootton Abbots*, being a private leet within the leet of the hundred of *Whitchurch*?

This caſe was firſt argued in laſt *Michaelmas* term, by Mr. Serjeant *Davy* for the proſecutor, and Mr. Serjeant *Burland* for the defendant: And again this term, by Mr. *Dunning* for the proſecutor, and Mr. Serjeant *Glynn* for the defendant.

For the proſecutor it was argued, that the defendant was not exempt. The offices of tythingman and conſtable are not incompatible; becauſe the duty of both is the ſame, only the former is circumſcribed within narrower limits; and in this caſe, the one juriſdiction is within the other. As to the objection that no man is obliged to do ſuit at two leets, the obligation on the defendant to do ſuit as tythingman one day in a year, might be an excuſe for his not attending the hundred court that day; but it would be ſingular to ſay, that the obligation of attending elſewhere, *one* day in a year, ſhould exempt from ſerving the office of conſtable which is *annual* and *perennial*. But

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the office of conſtable is no ſuit at all, therefore he is liable.— Tenants in ancient demeſne are exempt from *ſuit*, from ſerving the office of jurymen or attending the court leet, and yet are liable to ſerve the office of conſtable. 2 *Show.* 75. 1 *Ventr.* 344. *F. N. B.* 161. 376.

In 3 *Keb.* 230. *Rex* verſus *King*, Lord *Hale* ſays "regularly "a man who owes ſuit to the leet, owes none to the hundred; "but chuſing conſtables is no article of the leet, and therefore "the hundred ſhall not be excluded as to this." In *Freeman*, 348, 349. S. C. Lord *Hale* is made to uſe the ſame expreſſion; "that "the conſtable of an hundred is an article that the inferior leet "cannot meddle in." But the caſe of the *Queen* verſus *Jennings*, 11 *Mod.* 215. is in point. There upon a ſpecial verdict the queſtion was, whether the defendant, being an inhabitant of a particular leet, was excuſed from ſerving as high conſtable of the hundred? and the court held, he was *not* excuſed. In 3 *Keb.* 230. Lord *Hale* adds, "that by *cuſtom* a man who owes ſuit to the leet "may likewiſe owe ſuit to the hundred:" Here ſuch a cuſtom is found. Therefore the defendant is liable.

For the defendant it was inſiſted, *contra*, that he was exempt. 1. Formerly all reſiants were obliged to attend the leet of the hundred: but that being found inconvenient, by ſending huſbandmen to a diſtance from their home, the king granted inferior leets; and from that time it was held, that no man ſhould be bound to do ſuit and ſervice at *two* different courts. Lord *Coke's Com.* on *Magna Charta. c.* 35. 2 *Inſt.* 71. and on ſtat. *Marlebridge*, *c.* 10. 2 *Inſt.* 122. "If a man hath a houſe "within two leets, he ſhall only do ſuit where his perſon is "commorant; and where his bed is, there he ſhall be ſaid to be "commorant." So in *Dalton's Sheriff*, 402, 403. and 2 *Hawk. Pl. C. c.* 11. *ſect.* 3. "no man is obliged to attend two leets, "at the ſame time, in the ſame reſpect." 2. If he does not owe ſuit and ſervice to the ſuperior leet, he is not compellable to take upon him any of the offices of the ſuperior leet. As to the caſe of *Rex* verſus *King*, 3 *Keb.* 230. and *Freeman* (*a*), 348, 349. they are books of no authority, nor is the caſe to be found in any contemporary reporter. They make Lord *Hale* talk unintelligibly with reſpect to the difference between borough and upland towns; and even contradict himſelf in ſaying, "that "conſtables were before the ſtatute;" whereas in 2 *Pl. Cor.* 96.

(*a*) Lord *Mansfield* ſaid, that ſome of the caſes in *Freeman* were very well reported.

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he expreſsly ſays, "they were introduced by the ſtatute of *Win-* "*ton.*"—11 *Mod.* is likewiſe a book of no authority: And it is no reaſon, becauſe the Lord, as it is there ſaid, may ſit in the leet, that a private man may be choſen conſtable. 3dly. As to the cuſtom, no ſuch cuſtom is found, nor was meant to be found, as appears from the different expreſſions uſed in the verdict. For, with reſpect to the *manor*, the cuſtom is found to be *time out of mind*, and the jury find it in all its parts. But with reſpect to the *tything* of *Wootton Abbots*, they only find that by *ancient cuſtom* the reſiants have been choſen, and by ſuch ancient cuſtom have ſerved the office of conſtable of the hundred; but they do not find any obligation on them, or that any one was ever compelled to ſerve. Therefore it is a finding of evidence, not of facts: and if the finding be imperfect, it ought to be tried again.

Lord *Mansfield*. There is no authority or *dictum* whatſoever, by which it is held, that a reſiant within a leet, within the hundred, is excuſed from ſerving the office of conſtable of the hundred. Again, where there is a cuſtom of the ſort ſtated in this ſpecial verdict, there is no authority which ſays that ſuch a cuſtom is not good. On the other hand, there is an expreſs authority of a caſe of *Rex* verſus *King*, reported in two books, each of which ſtates the caſe in the ſame way. It is objected, however, that theſe are books of no authority: but if both the reporters were the worſt that ever reported, if ſubſtantially they report a caſe in the ſame way, it is demonſtration of the truth of what they report, or they could not agree. Here they agree in Lord Chief Juſtice *Hale*'s ſaying, "that the choice of a conſtable is no article of the buſineſs of a "leet," and that it is no excuſe that the party is within the juriſdiction of another leet. Another authority, in 11 *Mod.* 215, which is very particular and ſtrong, lays down the ſame doctrine. And further, Lord *Hale*, according to 3 *Keble* 230, adds, that if generally excuſed, yet by *cuſtom* one may be liable. Here a *cuſtom* is found by the verdict: But an objection is taken to the manner of finding it. I ſhould have thought, between theſe parties, the merits would have been tried without any cavil. The caſe comes before us upon a *ſpecial verdict*, which ſtates, "that there has been a court leet *from time whereof*, &c. and "that two perſons from time whereof, &c. have been choſen, "&c." and therefore, when it afterwards ſays by "*ancient cuſtom*," it muſt mean ſuch cuſtom as beforementioned, which is "*immemorial*."

merial." I think no man can doubt of what the jury meant, and I think the words they have uſed convey their meaning. Therefore I am of opinion that the cuſtom is ſufficiently found. 1774. REX *verſus* GENGE.

Aſton Juſtice. Ancient cuſtom in this caſe is immemorial cuſtom; and I agree with my lord in thinking that ſuch was the meaning of the jury. As to the party being exempt from ſerving one office, on account of his obligation to diſcharge the other, it is only meant that he is not liable to do it in the ſame manner, at the ſame time, in the ſame reſpect. But the office of conſtable of the hundred, according to Lord *Hale*, is not an article within the juriſdiction of the leet.—He obſerved that the doctrine in *Rex* verſus *Betteſworth*, 2 *Show.* 75. was well warranted.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred. Judgment for the king.

JONES *verſus* RANDALL.

Monday, Feb. 7th, 1774.

In an action upon a wager, whether a decree of the court of *Chancery* would be reverſed on appeal to the Houſe of Lords, proof of the decree and reverſal is ſufficient without ſhewing the previous proceedings below.—A *copy* of the judgment of reverſal is admiſſible, and need not be ſtamped.

THIS was an action upon a wager, whether a decree of the court of *Chancery* would or would not be reverſed in the houſe of lords? Verdict for the plaintiff, damages fifty guineas.

Upon a rule to ſhew cauſe, why there ſhould not be a new trial in this caſe, three objections were made to the ſufficiency of the evidence given at the trial. 1ſt. That a *copy* of the reverſal only, and not the minute book itſelf, was produced. 2dly. If ſuch copy was admiſſible, yet it ought to have been upon *ſtamps*. 3dly. That the *previous* proceedings ought to have been ſhewn, whereas the *decree only* was produced.

Lord *Mansfield*. The minutes of the judgment are the ſolemn judgment itſelf: not a word is added upon the journals: and a *copy* of them may certainly be read in evidence; for the inconvenience would be endleſs, if the journals of the houſe of lords were to be carried all over the kingdom. As to ſuch copy being upon *ſtamps*, it was decided in Queen *Anne*'s time by the opinion of all the judges of *England*, that copies of the proceedings of parliament need *not* be *ſtamped*. Formerly a doubt was entertained, whether the minutes of the *Houſe* of *Commons* were admiſſible, becauſe it is *not* a court of *record*; but the journals of the *Houſe* of *Lords* have always been admitted, even in criminal caſes.

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JONES *verſus* RANDALL.

Aſton Juſtice. They were ſo in *Rex* verſus *Oates*. *State trials*, *Vol.* iv. *p.* 44. *et vide page* 38.—As to the previous proceedings, the court held there was no neceſſity to ſhew them; for the ſingle fact in iſſue at the trial was, "whether the decree of the court "of *Chancery* was reverſed," not what the previous proceedings were: and therefore proof of the *decree*, and of its being *reverſed*, was clearly ſufficient. The rule was accordingly diſcharged.

The next day, Mr. *Dunning* moved in arreſt of judgment upon two grounds.

Firſt, that the event was not contingent, but *certain*: *Secondly*, that the contract was *illegal* upon the face of it, being *contra bonos mores*. *Vide infra*, 37.

Wedneſday, Feb. 9th.

ROWLAND *verſus* VEALE, and others.

In Juſtification by proceſs out of an inferior court, the plea ſtated "that the "plaintiff "below le-"vied his "plaint, in "a plea of "treſpaſs "on the "caſe; for "a cauſe of "action "ariſing "within "the juriſ-"diction "of the "court;" and held well enough, without ſetting forth the cauſe of action, or that the defendant became indebted within the juriſdiction.

THIS was an action of treſpaſs, aſſault, and falſe impriſonment. Plea as to the treſpaſs and aſſault, not guilty: And as to the impriſonment, a ſpecial juſtification.—"That "within the fee of *Trematon* in the counties of *Devon* and "*Cornwall*, there is a certain court of record holden at the "caſtle of *Trematon*, within the ſaid fee of *Trematon*, from *three* "*weeks* to *three weeks*: and that at a certain court held, *&c.* "the ſaid *Andrew Veale levied his certain plaint* againſt the ſaid "*Thomas Rowland*, in a certain plea of treſpaſs upon the caſe, "for a *cauſe of action* perſonal *ariſing within the juriſdiction* of "that court; and thereupon ſuch proceedings were had, *&c.* "that afterwards, *&c.* it was conſidered by the ſaid court, that "the ſaid *Andrew* ſhould recover againſt the ſaid *Thomas Row-*"*land* 14*l.* 1*s.* for his damages, *&c.* Upon which, *&c.* a "certain precept in writing iſſued, *&c.* directed to the bailiff of "the court of the ſaid fee, and alſo to the ſaid *Thomas Dunn* and "*Robert Barnaford* miniſters of the ſaid court, commanding "them to take the body of the ſaid *Thomas Rowland* and deliver "him to the keeper of, *&c.* to be by him ſafely kept, ſo that "the ſaid keeper might have his body, *&c.* at *the next court* to "be there held, *&c.* after the date of the ſaid precept, *&c.* "which ſaid precept, the ſaid *Andrew* delivered to the ſaid "*Thomas Dunn*, and *Robert Barnaford*, requiring them to ex-"ecute the ſame: Whereupon the ſaid *Thomas Dunn* and "*Robert Barnaford* afterwards, *&c.* took and arreſted the ſaid

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" *Thomas Rowland*, and delivered him to the keeper, to be by " him ſecurely kept, ſo that he might have his body, *&c.* " *at the next* court, to be there held after the date of the ſaid " precept."

To this plea there was a ſpecial demurrer, which came on to be argued laſt *Michaelmas* term, when the court took time to conſider; and now Lord *Mansfield* delivered the opinion of the court as follows:

Three exceptions have been taken to the defendants plea of juſtification. The *firſt* is, that the defendants have not ſufficiently ſet out the cauſe of action, but have only ſaid that the plaintiff below, *levied his plaint*, in a plea of treſpaſs on the caſe; nor have they ſet forth that the preſent plaintiff became *indebted within the juriſdiction* of the court. *Secondly*, it is not alleged that the *precept* for taking the body was ever *returned* to the court. And *thirdly*, that the writ was void, for that a *certain day* of return was *not* ſhewn.

With reſpect to the *firſt*, " that the *plaint* is ſet out too *gene-* " *rally*", let us conſider, what a plaint in an inferior court is. In *Lilly's Practical Regiſter*, fol. 195. a plaint is in the nature of an original writ: the form is there ſaid to be thus: " *A. B.* " *queritur verſus C. D. de placito tranſgreſſionis, et ſunt plegia de* " *proſeq. ſcilicet*, John Doe *et* John Roe." Here the plaint is ſet forth as in *Lilly*.—In *Wade* verſus *Hatcher*, *Lev. Ent.* fol. 176. the plaint is ſet out thus, " *levavit quandam querelam ſuam* " *verſus defendentem de placito tranſgreſſionis ſuper caſum tali-* " *terque ſuperinde proceſſum fuit.*" This differs from that, only in alleging that the damages were aſcertained by the recovery. In 2 *Lut.* 914. the plaint is ſet out in the ſame general manner.

Formerly, the courts of *Weſtminſter-Hall* were much more ſtrict in regard to the ſetting out proceedings of inferior juriſdictions; and nothing was to be preſumed in favour of their regularity: nor was it allowable to ſet them out with a *taliter proceſſum eſt*: but theſe objections in point of form, have, of late years, been over-ruled in order to come at the real merits: And ſo it was determined in 2 *Lev.* 81. *Doe* and *Parmiter*. *Hil.* 24 *&* 25 *Car.* 2. The ſame doctrine is likewiſe laid down in 1 Ld. *Raymond* 80. upon the authority of 2 *Lev.* 81. though it is there ſaid, that the old books were to the contrary. But this objection as to the plaint is fully anſwered, and the law ſettled, in 2 *Mod.* 195. *Higginſon* verſus *Martin*, upon a plea

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of juſtification to an action of treſpaſs and falſe impriſonment, ſetting forth generally "that a plaint was entered in *placito* "*tranſgreſſionis* in the court of *Warwick* with a *taliter pro-* "*ceſſum*;—exception was taken that it was not ſet forth what *kind* of treſpaſs it was; but the court held it was well enough. As to the *latter* part of this objection, "that it is not ſtated in "the plea, that the plaintiff became indebted within the juriſ- "diction," the ſame liberality is to hold. For if the cauſe of action did not ariſe within the juriſdiction, the defendant ſhould have availed himſelf of it by plea in the court below: or, if it was not alleged in the plaint below to be within the juriſdiction, it would have been bad on error, or writ of falſe judgment, and ſo he might have taken advantage of it: but as he has taken neither of theſe methods, the preſumption is, that the cauſe of action did ariſe within the juriſdiction. This very objection was taken in the caſe of *Titley* verſus *Foxall*, *Trin.* 31 *Geo.* 2. in *C. B.* and over-ruled. That was a plea of juſtification to an action of falſe impriſonment, under proceſs for a debt iſſuing out of the *Borough Court* of *Shrewſbury*; and there it was laid as here, "that the defendant levied a plaint in a plea "of treſpaſs for a cauſe of action, ariſing within the juriſdiction "of the court." *Objected*, that it did not appear that the cauſe of action aroſe within the juriſdiction, or that the defendant became indebted there. The court ſaid, it was neceſſary it ſhould appear that the cauſe of action did ariſe within the juriſdiction; but in the caſe before them it did appear as ſtrongly as poſſible; for it was ſtated, "that he levied a plaint in a cauſe of action "ariſing within the juriſdiction." So here, it is expreſsly ſet forth that the plaint was for a cauſe of action ariſing within the juriſdiction of the court.

If the cauſe of action does not ariſe within the juriſdiction, the defendant muſt avail himſelf of it by plea in the court below: or, if not alleged in the plaint below to be within the juriſdiction, it will be bad on writ of error or falſe judgment.

With regard to the *ſecond* objection, the diſtinction which has prevailed as to the neceſſity of ſtating that the writ was returned or not, is between a *capias* upon *meſne proceſs*, and a writ of execution. To a *capias* upon the former, the return of the precept muſt be ſet forth: but in the latter caſe it is unneceſſary. The caſes in point are *Doiley* verſus *Joliffe*, *Lane* 52. and *Hoe*'s caſe in 5 *Rep.* 90. where the reaſon aſſigned, why upon execution the return need not be ſet forth, is, that after execution, the plaintiff has had the effect of the ſuit. But if the *capias* in proceſs be not returned, the arreſt is *tortious*; for there the object of the writ is to enforce the appearance of the party. The caſe cited at the bar, 2 *Rol. Abr.* 563. *pl.* 18. was upon *meſne*

Where it is under proceſs of *execution*, it need not be ſhewn that the precept was returned; otherwiſe in *meſne proceſs*.

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meſne proceſs.—*Freeman* verſus *Blewitt*, 1 *Salk.* 409. was a plaint in replevin entered in the ſheriff's court in *London*, and pleaded by the defendant as ſerjeant at mace. Upon demurrer it was objected, that the precept was not returned; and the exception was allowed, becauſe the writ is a returnable proceſs, and the ſerjeant at mace a principal officer: otherwiſe, where the juſtification under a proceſs is by a ſubordinate officer.—In 2 *Mod.* 59. which I ſhall preſently cite at large, one of the objections was, that it was not alleged that the precept was returned; but the court held that the officer was not puniſhable though he did not return the writ.

The *laſt* objection that has been taken in this caſe is, that the writ is void not being returnable on a *day certain*, but generally, at the *next court*. Now it is ſtated in the preſent juſtification that this court is holden from *three weeks* to *three weeks*, and that this is an execution againſt the body, not a writ upon *meſne proceſs*. In ſupport of this objection, *Cro. Car.* 254. *Dyer* 262. *b. pl.* 33. *Cro. Jac.* 314.—2 *Bul.* 36.—1 *Mod.* 81. were cited, but all theſe are caſes upon *meſne proceſs*, imparlance, or continuance. But in *Freeman* 319. *Hil.* 1673, on a writ of falſe judgment to reverſe a recovery ſuffered in an inferior court, amongſt many exceptions, one was, that there is an imparlance *ad proximam curiam tent.* and doth not ſay *ſcil.* ſuch a day; and cited 1 *Rol. Abr. tit. Continuance*, 484. *pl.* 7. *Cro. Car.* 274. S. C.—But it was anſwered, that admitting it be error, yet all errors of that nature are ſalved by the parties appearance. In 38 *E.* 3. 2. *Brok. Contin.* 48. 2 *Crok.* 284. it is laid down 'that a miſcontinuance of a proceſs is well aided by appearance of the parties; as where one proceſs is awarded for another, or miſreturned.' The reaſon given in 2 *Bul.* 36. and *Cro. Jac.* 314. why a writ returnable at the next court generally, is not good, does not hold in the caſe of an execution; for there the ground of it was this; that otherwiſe the party may be detained forty years, before any court is held. It ought therefore to have been ſhewn for certain, when the court was to be held; though it was there alleged, that it appeared by their juriſdiction, that the court was held *de die in diem*; And yet the court were of opinion that the plea was ill.

The court was held from *three weeks* to *three weeks*, and the writ was, to have the body at the *next court*, generally: It is good; and a day certain need not be ſhewn.

But the laſt caſe in order of time has departed from this rule of ſhewing a day certain, even upon *meſne proceſs*: And that is the caſe of *Crowder* v. *Goodwin*, 2 *Mod.* 58, 59. *Mich.* 27 *Car.* 2. and was thus: In aſſault and battery and falſe impriſonment, there was a juſtification by proceſs out of an inferior

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court. Upon demurrer, ſeveral exceptions were taken to the plea; the ſecond was, that the precept was to take the plaintiff, and have him *ad proximam curiam*, which was not good, for it ſhould have been on a day certain. To this it was anſwered, that it was well ſet forth to have the plaintiff *ad proximam curiam*. The Chief Juſtice doubted, that upon this exception the plea was ill, but the three other judges held it *good*; and it was argued at the bar to be well ſet forth; for how can a return be upon a day certain, when the judge may adjourn *de die in diem*? But this caſe is much ſtronger than that, for here it is alleged upon the record that the court was holden from *three weeks* to *three weeks*; the day therefore was certain: *Nam certum eſt quod certum reddi poteſt.*

We are, therefore, all of opinion, that theſe three objections ought to be over-ruled, and judgment given for the defendant.

Thurſday, Feb. 10th.

An *indorſee* of a promiſſory note payable three months after date, may be diſcharged under an inſolvent act, which takes place *before* the three months are expired: for it is *debitum in præſenti, ſolvendum in futuro.*

WORKMAN *verſus* LEAKE.

MR. *Lucas* had obtained a rule to ſhew cauſe, why the defendant ſhould not be diſcharged upon filing common bail; the cauſe of action for which he was arreſted, accruing prior to the inſolvent act 12 *Geo.* 3. *c.* 23. which act took place, 1ſt of *January* 1772, and under which the defendant had obtained his diſcharge. The nature of the debt was as follows: The defendant had indorſed a note, dated the 28th of *October* 1771, drawn by one *Hodgſon*, payable to the defendant, or order, three months after date; and at the ſame time he gave an undertaking to pay to the plaintiff a certain ſum for goods then ſold and delivered to the ſaid *Hodgſon*, on ſix months credit given for the ſaid goods. The defendant was arreſted upon the note.

Mr. *Lucas* in ſupport of the rule cited *Liſle* verſus *Jenyns*, 1 *Barnes* 81.

Mr. Juſtice *Willes* mentioned the caſe of *Macarty* verſus *Barrow*, 2 *Str.* 949. where the defendant, who was the drawer of certain bills proteſted for non-acceptance, between the drawing and return became bankrupt; and being ſued to execution moved to be diſcharged under the ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 7. and was diſcharged accordingly.

Lord *Mansfield.* Upon the motion I doubted; but my clerk has ſince reminded me that upon application I have made twenty ſuch orders.

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The words of the ſtat. 12 *Geo.* 3. *c.* 23. *ſect.* 27. are much larger than thoſe of the ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 7. which latter ſtatute mentions only ſuch debts as were *due* or *owing* at the *time* the party became bankrupt; whereas this ſtatute extends to all debts, contracted, incurred, occaſioned, owing, or *growing* due. I am clearly of opinion that this is *debitum in præſenti, ſolvendum in futuro:* and conſequently, being due on the 1ſt of *January* 1772, it is diſcharged under this act. Otherwiſe, if it had depended upon a *contingency:* becauſe there, till the event happens, it is no debt.*

The three other judges concurred.

Per cur. let the rule be made abſolute.

FREAME et UXOR *verſus* PINNEGER.

Saturday, Feb. 12th.

Motion to ſet aſide an award muſt be made *before* the laſt day of the next term after ſuch award is publiſhed; otherwiſe it is too late; and an attachment for the non-performance of it may iſſue.

MR. *Morris* ſhewed cauſe why an award ſhould not be ſet aſide, and at the ſame time moved to make abſolute a rule for an attachment for the non-performance of it. His grounds againſt ſetting aſide the award were two; 1ſt. That the application was too late, the award being a ſubmiſſion within ſtat. 9 & 10 *W.* 3. *c.* 15. *ſect.* 2. which provides, "that any arbi- "tration procured by corrupt or undue means ſhall be adjudged "void, *&c.* ſo as complaint of ſuch corruption, *&c.* be made "in the court where the rule is made for ſubmiſſion to ſuch ar- "bitration, before the laſt day of the next term, after ſuch ar- "bitration made and publiſhed to the parties." In this caſe, the application was not originally made till *after* the expiration of that time. Therefore it is now too late: 2dly. Upon the merits.

Mr. *Wallace*, Mr. *Manſfield*, and Mr. *Dunning*, *contra*. That the objection to the award was within time; the application being made as ſoon as they were called upon by a motion for an attachment to enforce the award.

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* *N. B.* In the caſe of *Paget* verſus *Wheate*, *Eaſter* term 21 *Geo.* 3. the ſame point occurred. That was an action upon a bond bearing date the 21ſt of *September* 1777; Plea, inſolvent debtors act, 18 *Geo.* 3. *c.* 52. and that the cauſe of action was contracted before the 28th of *January*, 1778, when the act took place. Replication ſetting forth the condition of the bond, by which it appeared it was conditioned for payment on the 21ſt of *September* 1778. To this the defendant demurred. The queſtion was, whether the bond was diſcharged? The court took time to conſider; and afterwards, in the ſame term, Lord *Manſfield* delivered the opinion of the court, that the bond was diſcharged, upon the authority of the above caſe of *Workman* verſus *Leake*.

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Lord *Mansfield* after ſtating the clauſe and proviſo in the ſtatute obſerved, that though the firſt clauſe was inaccurately penned, yet the meaning of it was ſufficiently explained by the proviſo in ſection 2. and ſaid, he was extremely clear from the words of the proviſo, that the time of objecting to an award is expreſsly limited to the laſt day of the term next after it is publiſhed. He was equally clear, that where no objection is made within ſuch limited time, the other ſide may apply for an attachment to enforce the performance of the award. In this caſe the impeachment of the award being ſubſequent to the time preſcribed by the ſtatute, was therefore too late: And the motion for an attachment clearly regular.

The court ordered the rule for ſetting aſide the award to be diſcharged, but without coſts: And that the attachment ſhould lie in the office a month after bringing in the money before the maſter.

Same day.

REX *verſus* SMITH.

No *certiorari* lies on the ſtat. 30 *G.* 2. *c.* 24.

MR. *Davenport* had moved for a *certiorari* to the juſtices of *Middleſex* to remove an indictment againſt the defendant upon the ſtatute of 30 *Geo.* 2. *c.* 24. for the more effectual puniſhment of perſons obtaining goods or money under falſe pretences, *&c.* he ſaid, it was a doubt whether a *certiorari* would lie: and now, upon ſhewing cauſe, the court were clearly of opinion it would not.

Same day.

GOLDING *qui tam verſus* BARLOW.

Quære, if an informer in a *qui tam* action ſhall be obliged to give ſecurity for coſts?

MR. *Selwyn* had obtained a rule for the plaintiff in a *qui tam* action, to give ſecurity for the coſts upon affidavit of the lowneſs of his circumſtances.

Mr. *Dunning* now ſhewed cauſe, and inſiſted that this was not the practice. And Lord *Mansfield* ſaid, that the court would not do it in the caſe of a foreigner's* being a plaintiff; nor in matters of property, except in ejectment, where the leſſor of the plaintiff is an infant. But the queſtion in this

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* *Vide* 2 *Str.* 1206. *Real et al.* v. *Macly*, where the court refuſed to ſtay the proceedings in the caſe of a *foreigner*, *et poſt. Nuncomar* v. *Burdett*, *Mich.* 15 *Geo.* 3. where it was refuſed upon motion in the firſt inſtance, as a *ſettled* point.

caſe

case was put an end to by an affidavit, stating the plaintiff to be a person of property. Whereupon the rule was discharged. 1774.

GOLDING *versus* BARLOW.

BOUTEFLOUR *versus* COATES.

Same day.

UPON a rule to shew cause why the defendant, who was a bankrupt and had obtained his certificate, should not be discharged, the short state of the case was, that in a former action against the defendant, he had given a bail-bond to the sheriff, which was forfeited before the commission, by non-appearance. The present action was brought upon this bail-bond, and the defendant had obtained his certificate under the commission, but the judgment was not obtained till after the certificate allowed.

A certificate discharges a bankrupt from a debt accruing *before* the commission tho' judgment be not obtained till *after* the certificate allowed.

Mr. *Mansfield* for the defendant, Mr. *Wallace* for the plaintiff.

Lord *Mansfield*. Here was a breach, and the penalty forfeited; therefore the debt was due, though execution could not be taken out for more than the damages. It is not the case of a contingent debt, not reduced to a certainty; which is not discharged by the certificate.

The three other judges were of the same opinion. Rule made absolute.

THE END OF HILARY TERM 14 GEORGE III.

EASTER TERM

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Thurſday, April 21ſt.

REX *verſus* CROKE.

Where by *ſtatute*, a ſpecial authority is delegated to particular perſons, affecting the *property* of individuals, it muſt be *ſtrictly* purſued; and appear to be ſo upon the *face* of their proceedings.

BY ſtat. 9 *Geo.* 3. *c.* 89. entitled "an act for making a road "from *Blackfriars Bridge* acroſs *St. George's Fields*, *&c.*" a power is given to the *mayor*, *aldermen*, and *commons* in *common council aſſembled*, to treat with the owners, and occupiers of, and other perſons *intereſted* in ſuch houſes, lands, and tenements, as ſhall be *neceſſary* to be purchaſed for the purpoſes of the act, for the purchaſe of the ſame: And it is enacted, "that all bodies "politic, *&c.* and every perſon poſſeſſed of, or intereſted in, any "lands, *&c.* which, by the ſaid *mayor*, *aldermen*, and *commons* in "*common council aſſembled*, ſhall be thought *neceſſary* for any of the "purpoſes of the act, ſhall have power to ſell and convey any of "ſuch lands, *&c.* to the *mayor*, *commonalty*, and citizens of the "city of *London*. And in caſe of refuſal or inability to treat, "then the juſtices of the county of *Surry* at their quarter ſeſſions, "or at any adjournment, are required upon application of the "ſaid *mayor*, *aldermen*, and *commons* in *common council aſſembled*, "or of any perſons on their behalf, to iſſue a precept to the "ſheriff to ſummon a jury, who are to aſſeſs the value of "ſuch lands, and of the *proportionable value* of the reſpective "eſtates and *intereſts* claimed therein, *notice in writing* having "been previouſly given to the perſons intereſted, at leaſt "*fourteen days before*, and left at the dwelling-houſe or uſual "place of abode of ſuch perſon, or with ſome tenant of ſuch "lands, *&c.*" and it is further enacted, "that all and every "perſon and perſons, who ſhall have any *mortgage* or *mort-*"*gages* on ſuch lands, tenements, and hereditaments, *not*

"being

" being *in poſſeſſion* thereof by virtue of ſuch mortgage or " mortgages, ſhall, on the tender of the principal money and " intereſt due thereon, together with ſix months intereſt of " the ſaid principal money, by the ſaid *mayor*, *aldermen*, and " *commons*, in *common council aſſembled*, or by any perſon or " perſons whom they ſhall appoint, immediately aſſign ſuch " mortgage or mortgages to the ſaid *mayor*, and *commonalty* and " *citizens*, or ſuch perſon or perſons as they ſhall appoint in " truſt for them; or, in caſe ſuch mortgagee or mortgagees " ſhall have notice in writing from the ſaid *mayor*, *aldermen*, " and *commons* in *common council aſſembled*, that they will pay " off and diſcharge the principal and intereſt, which ſhall be " due on the ſaid mortgage or mortgages, at the end or ex- " piration of ſix calendar months, to be computed from ſuch " notice given; that then, at the end of the ſaid ſix months, " on payment of the principal and intereſt ſo due, ſuch mort- " gagee or mortgagees ſhall aſſign his, her, or their intereſts in " the premiſes to the ſaid *mayor* and *commonalty* and *citizens*, " or ſuch perſon or perſons as they ſhall appoint in truſt for " them; and in caſe ſuch mortgagee or mortgagees ſhall refuſe " to aſſign as aforeſaid, on ſuch tender or payment, then all " intereſt on every ſuch mortgage, ſhall ceaſe and deter- " mine."

The defendant, being a mortgagee *out of poſſeſſion* of a greater quantity of land than the commiſſioners wanted, had inſiſted that he was entitled under the act to the whole of ſuch mortgage money. The city refuſed to comply with this demand; whereupon a jury was empannelled, and the quarter ſeſſions, upon a hearing, made the following order.

Surry, to wit. " BE it remembred that in purſuance of an " act of parliament made in the 9th year, *&c.* at a general quar- " ter ſeſſions of the peace, *&c.* holden, *&c.* at *Southwark*, *&c.* " before *Joſeph Mawby*, *&c.* juſtices, *&c.* aſſigned to keep the " peace in the county aforeſaid, *&c.* upon application being " made, *&c.* by and on behalf of the *mayor and commonalty and* " *citizens* of the city of *London*, the ſaid court *did* iſſue a precept, " directed to the ſheriff of, *&c.* to empannel, *&c.* a competent " number of perſons qualified to ſerve on juries, *&c.* to in- " quire and aſſeſs upon their oaths, the value of *all that piece* " of ground in the tenure or *occupation* of *George Holroyd*, and " of the *proportionable value* of the *reſpective eſtates* and intereſts " claimed therein, or in any part thereof, ſo that the ſaid court " might

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" might give ſuch judgment thereupon, as in and by the ſaid " act they *were* authoriſed to give, and they lawfully *might*, to " the end that the ſaid ground and premiſſes, and the ſeveral and " reſpective eſtates and intereſts therein, might be veſted in the " *mayor* and *commonalty* and *citizens* of the ſaid city of *London*, " in and for the purpoſes in the ſaid act mentioned: And after- " wards, to wit, at an adjournment. *&c.* out of ſuch perſons, a " jury of twelve perſons *are* drawn, to inquire of the value of " the ſaid premiſſes, and of the proportionable value of the re- " ſpective eſtates and intereſt claimed therein, or in any part " thereof; who having proceeded to hear evidence given upon " oath duly adminiſtered by the ſaid court, and what is alleged " by the council on behalf of the *mayor and commonalty and ci-* " *tizens* of the ſaid city of *London*, and on proof upon oath of " *due notice* having been given to *Benjamin Croke*, *&c.* of *Primroſe* " *Street*, *&c.* a *mortgagee* or aſſignee of the premiſſes, of this " application to the court, for their verdict upon their oaths, " ſay, that the eſtate and intereſts in the ſaid premiſſes for and " during the remainder of a leaſe, of amongſt others the ſaid " premiſſes claimed by the ſaid *Benjamin Croke* as a mortgagee " or aſſignee thereof, of which leaſe there were four years un- " expired at *Michaelmas* 1772, are of the value of 200 *l.* There- " fore it is conſidered and adjudged by the ſaid court, that the " ſaid ſum of 200 *l.* ſo found by the ſaid jury in manner afore- " ſaid, be the *value* of the *ſaid eſtate* and *intereſt*; and they do " aſſeſs and award, that the ſame be paid for the purchaſe there- " of, to the ſaid *Benjamin Croke*, *or* to *ſuch other perſon* or perſons " as is or are *ſeiſed* of or *intereſted* in the ſame, according to his " and their *reſpective* eſtates or intereſts therein, on making " out a good title to the ſame, and executing proper convey- " ances and aſſignments thereof, to the *mayor* and *commonalty* and " *citizens* of the ſaid city of *London*."

This order being removed by *certiorari*, Mr. *Bearcroft* on the part of the defendant, took four exceptions.

Firſt, it is not ſtated that the " *mayor*, *aldermen*, *and commons* " *in common council* aſſembled," have adjudged theſe lands to be *neceſſary* for the purpoſe. *Secondly*, It is ſtated, that the application was made by the *mayor*, *commonalty*, and *citizens*, inſtead of being made by the " *mayor*, *aldermen*, and *commons* in *common coun-* " *cil* aſſembled," as the act directs. *Thirdly*, it is not ſtated, whether the defendant is a mortgagee in or out of poſſeſſion, but only that he is a mortgagee: which is uncertain and inſufficient, becauſe

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becauſe a ſpecial proviſion is made by the act with reſpect to a mortgagee out of poſſeſſion, which proviſion has not been complied with in this caſe. *Fourthly*, that though the proceedings appear upon the face of them to have been at different times, they are all ſtated in the paſt, inſtead of the preſent tenſe, which is fatal: becauſe all proceedings before juſtices, being ſuppoſed to be entered at the moment, ought to be in the preſent tenſe. And he cited Ld. *Raym.* 1347. *Rex* v. *Roberts*, 1 *Str.* 608. ſame caſe, as an authority in point.

To this it was anſwered by Mr. ſerjeant *Glynn* for the proſecution, 1ſt. That there is no need of any act of the *mayor*, *aldermen* and *commons*, in *common council* aſſembled, *adjudging* that the lands are *neceſſary* to be purchaſed; for they are the perſons who apply to purchaſe the lands, and therefore of neceſſity appear to adjudge them neceſſary to be purchaſed. 2dly. The application by the *mayor*, *commonalty*, and *citizens* is well enough, for they are the corporation, and include the mayor, aldermen, and commons in common council aſſembled, who are the repreſentatives and the acting part of the corporation. 3dly. It is immaterial to ſtate whether the *mortgagee* was *in* or *out* of poſſeſſion, for in either caſe he has an eſtate and *intereſt*; therefore the ſeſſions had juriſdiction; and the act does not require that a tender ſhould be made of the whole mortgage money, but only for ſuch part as ſhall be neceſſary for the purpoſes of the act. 4thly. The ſtating a paſt tranſaction is more properly expreſſed in the paſt, than in the preſent tenſe.

Lord *Mansfield*. This is a ſpecial authority delegated by act of parliament to particular perſons, to take away a man's property and eſtate againſt his will; therefore it muſt be *ſtrictly* purſued, and muſt appear to be ſo upon the *face* of the order.

Several objections have been taken to this order in point of form, which are material. 1ſt. That the *mayor*, *aldermen*, and *commons*, in *common council* aſſembled, have not given an opinion, that the lands are neceſſary to be purchaſed, nor that an application was made by them to the juſtices, but that an application was made by the *mayor*, *commonalty*, and *citizens*. Now they are two diſtinct things; the one is a *ſelect* body, the other is the *corporation* at large: and we cannot here go into any fact tending to reconcile ſuch diſtinction, or to ſhew that in truth the latter are the proper perſons. But it ought to have been ſtated, that the mayor, aldermen, and commons, in common council aſſembled, had given ſuch opinion; and that an application had been made by them to the juſtices.

The *mayor*, *aldermen*, and *commons* in *common council aſſembled*, are not ſufficiently deſcribed by the *mayor* and *commonalty* and *citizens*, tho' in fact the latter include the former.

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There is another objection in point of form, which is not mentioned at the bar; which is, that the order does not ſtate that a *notice was* given *in writing* to Mr. *Croke* according to the requiſites ſpecified in the act; but only ſays "upon proof of "*due* notice having been given to him," which is inſufficient, a particular notice being ſpecified by the act.

If a *particular* form of *notice* be preſcribed, it muſt be *fully* ſet out and *preciſely* purſued: An allegation that *due notice* was given is not ſufficient.

The adjudication muſt follow the proviſions of the act.

As to the caſe upon the merits, it appears, that the defendant is a mortgagee *out* of poſſeſſion of this piece and of ſome other lands for a term of years of which four only are to come. Now the act has made an *expreſs* proviſion in the caſe of a mortgagee out of poſſeſſion, and has directed, that upon payment of principal, intereſt and coſts, the mortgagee ſhall make an aſſignment of his mortgage. The reaſon ſeems to be this; that there can be no account to ſettle between mortgagor and mortgagee; and no injuſtice is done in reſpect of the mortgagor; becauſe the mortgagee might always aſſign to any other perſon. As to a mortgagee in poſſeſſion, the act is totally ſilent. But the city, inſtead of proceeding upon the clauſe abovementioned, have conſidered the defendant as a proprietor having an intereſt in the whole land: beſides, the mortgagor is not ſummoned, nor made a party, nor is any ſum adjudged to him; and inſtead of fixing the value and proportion of each reſpective intereſt, they have adjudged that the 200 *l.* ſhall be paid to the defendant, or to ſuch other perſon as ſhall be ſeiſed, *&c.* according to their intereſt. Who that perſon is, or what proportion he is entitled to, does not appear. Therefore both in point of ſubſtance, as well as in form, this order is greatly defective.

We deſire not to be underſtood to give our opinion that the city may not proceed againſt the mortgagor and mortgagee as perſons intereſted under the *firſt* clauſe; but then they muſt both be joined.

A defective notice is not cured by the appearance of the party.

Aſton, Juſtice. This order is very defective. The want of notice to the mortgagor is very material: and with reſpect to the mortgagee, the notice required by the act ought to have been fully ſet out, and preciſely purſued: and it is not cured by his appearance.

The adjudication and award of the value, does not anſwer the direction of the act; which ſays, that judgment may be given of the *reſpective* intereſts; whereas this order is to pay the 200 *l.* to the defendant, or ſuch perſons as ſhall be intereſted therein: This

This is no apportionment or declaration of the reſpective intereſts; and therefore it is inſufficient. 1774.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Per Cur. Let the Order be quaſhed.

WRIGHT *verſus* HOLFORD.

Friday, April 22d.

THIS was a caſe out of Chancery upon the conſtruction of a will, and the material facts were as follow;

That by articles of agreement bearing date the ——— day of ——— 1755, and entered into in conſideration of marriage, the teſtatrix *Conſtantia Maria Holford* was empowered to diſpoſe from time to time by deed, atteſted by two witneſſes, or by will duly atteſted by three witneſſes, of ſuch eſtates as ſhould come to her during her coverture. In the ſame year the marriage was had; and on the 21ſt of *April* 1758, upon the death of her uncle, who was tenant for life of the eſtates in queſtion, ſhe became entitled by deſcent, as co-heir, to one undivided moiety of the ſoid eſtates. On the 3d of *May* 1758, ſhe made her will, and appointed "All her ſaid undivided moiety, to truſtees, to "the uſe of her huſband *Peter Holford* for life, with limita- "tion to preſerve contingent uſes, remainder to her ſons to be "begotten on her body, and in default of ſuch iſſue, to the "uſe of all and every the daughter and daughters of the ſaid "*Peter Holford*, and her the ſaid *Conſtantia Maria Holford*, "lawfully to be begotten, and to the heirs of their body and "bodies; ſuch daughters, if more than one, to take as tenants "in common, and not as joint-tenants; and for default of ſuch "iſſue, to the uſe of her right heir."

Deviſe "to the uſe of all and every the daughter and daughters of &c. and the heirs of their *body* and *bodies*; ſuch daughters, *if* more than one, to take as tenants in common, and not as joint-tenants; and for *default of ſuch* iſſue, to the uſe of the teſtatrix's right heirs." The daughters take croſs remainders.

The teſtatrix died, leaving *John Wright* her heir at law; and leaving by her ſecond huſband, two daughters, *Conſtantia* and *Catherine*: *Conſtantia* died at the age of two years; *Peter Holford*, *John Wright*, and *Catherine Holford* living. The queſtion for the opinion of the Court was, Whether on the death of the daughter *Conſtantia Holford*, without iſſue, the plaintiff, *Wright*, as heir at law, became entitled to the ſhare of the eſtate of *Conſtantia Holford*; or whether there were croſs remainders between the daughters.

Mr. Serjeant *Hill*, on behalf of the plaintiff, the heir at law, ſtated it to be a principle of law, as old as the time of *Hen.* 7. that an

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an heir at law is not to be diſinherited, but by an *expreſs* deviſe or *neceſſary* implication: A probable intent or conjecture is not ſufficient. 13 *H.* 7. 17. *b. Gardiner* v. *Shelden. Vaughan* 262. 268. S. P. Therefore without ſuch expreſs deviſe, or neceſſary implication, no croſs remainder could be raiſed in the preſent caſe. Firſt then, as to *expreſs* words, there can be no pretence of any in the deviſe in queſtion. And ſecondly, There are no words from whence to infer by *neceſſary* implication, that it was clearly the intention of the teſtatrix to create croſs remainders as between the daughters. On the contrary, the words are in ſubſtance the ſame as thoſe in the caſes of *Comber* v. *Hill*, 2 *Str.* 969. and *Williams* v. *Brown*, 2 *Str.* 996. in both of which the court was clearly of opinion againſt raiſing croſs remainders. In *Comber* v. *Hill* the deviſe was "To *Richard* "*Holden* and *Elizabeth Holden*, equally to be divided, and "to the heirs of their reſpective bodies, and for default "of ſuch iſſue, to *Ann Holden* in fee." In *Williams* v. *Brown* the teſtator deviſed "to the uſe of all and every the child "and children, both male and female, born and to be born of "the body of *Mehetabel*, equally to be divided between them, "and of the heirs of their *reſpective* bodies; for want of ſuch "heirs, remainder over." If theſe caſes differ at all from the preſent, it is only in the addition of the word "reſpective," which if inſerted here would have been ſuperfluous; becauſe by "*ſuch iſſue*" is neceſſarily implied *reſpective* iſſue; and ſo it is laid down by Lord *Cowper* in *Cook* v. *Cook*, 2 *Vern.* 545, 6. "a de-"viſe to the teſtator's two daughters, and their iſſue; and in "default of ſuch iſſue to *J. S.* they have a joint eſtate for life, "and ſeveral inheritances: if one of the daughters dies without "iſſue there ſhall not be croſs remainders: but her moiety ſhall "go over to the remainder-man for want of *ſuch* iſſue, i. e. *re-*"*ſpective* iſſue."—Thirdly, In moſt of the caſes where the implication has been raiſed, it has been in favour of the *heir* at law. It was ſo in the caſe of *Doe*, on the demiſe of *Burville* v. *Burville*, *Paſch.* 1773, *R. B.* for if the implication had not been raiſed, the eſtate would have gone from the heir at law. That conſideration was likewiſe the principal ground upon which the caſe of *Holmes* v. *Meynell* was determined, *T. Raym.* 453. Sir *T. Jones*, 172. and the caſes there cited; 13 *H.* 7. 17. 4 *Leon.* 14. *pl.* 51. and *Dyer*, 330. *Cloche's* caſe ſupports the ſame doctrine. Fourthly, It is a rule, that croſs remainders cannot be implied between more than *two*. In *Cro. Jac.* 656, a deviſe to *three* and the heir of their bodies, and in default of

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iſſue remainder over, was held *not* to create croſs-remainders. It is true, that in this caſe there were in fact only two; yet there might have been more, and therefore it is within the reaſon of the above principle. *Laſtly*, a croſs-remainder is never favoured in law, and ſo Lord *Hardwicke* held in 1 *Atkyns* 580; confirming at the ſame time the ſettled and eſtabliſhed doctrine, that it can only be raiſed by an implication abſolutely neceſſary. As all the caſes therefore, where croſs-remainders have been allowed, are either in favour of the heir at law, or under circumſtances in which the eſtate would otherwiſe have gone from him, and as no certain intent appears in this caſe to raiſe them, the court will not imply them againſt the title of the preſent heir.

Mr. *Hargrave contrà* for the defendant. The expreſſion "to "*all and every* the daughter and daughters, and the heirs of "their *body* and *bodies*," not only furniſhes a *neceſſary* implication, but *expreſsly* creates croſs-remainders as between them. For *firſt*, if there had been one daughter only, ſhe would clearly have taken the whole eſtate by this deviſe, in excluſion of the heir at law; and of courſe it was impoſſible that the teſtatrix in the one caſe ſhould intend to give her the whole, and in the other only half. Again, the words "in default of ſuch iſſue," can neither be conſtrued nor applied in any other manner than as relative to the iſſue of all and *every* daughter; which plainly ſhews that the reverſion in fee was not to come into poſſeſſion, but upon failure of iſſue of every daughter. In anſwer to the authorities, he cited a caſe *Mich.* 13 & 14 *Eliz. anon.* in *Dyer* 303. *pl.* 49. "The teſtator deviſed two parts of his eſtate to his four younger "ſons, and the heirs male of their bodies begotten, and if they all "die without iſſue male of their bodies, or any of their bodies, "the two parts were to revert to the right heirs of the deviſor. "Three of the younger ſons died; and the court were of opinion, "that the ſurvivor had an eſtate-tail in the whole two parts." Again in 4 *Leon.* 14. *pl.* 51. cited by Serjeant *Hill*, it was in terms expreſsly adjudged, "that the eldeſt ſon ſhould take the "eſtate by the *implicative* deviſe." But he relied principally on the caſe of *Holmes* verſus *Meynell*, *Raym.* 453. reported likewiſe in *Pollexfen* 425. as in point. The deviſe there was "to "the teſtator's two daughters and their heirs, equally to be di-"vided between them, and in caſe they happen to die without "iſſue, then to his nephew *Francis* in tail."—And the court held, "that *Francis* took nothing till both were dead without "iſſue." As to *Clache*'s caſe, it was determined upon the particular words which amounted to a ſpecial limitation of the

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eſtate of the teſtator himſelf; under which circumſtances, the court held there could be no implication of a croſs-remainder. So in *Dyer* 326. in the margin, it is ſaid to have been held by the court, that if a deviſe be to two brothers in tail, and if they die to the daughter; if one dies without iſſue, it is no croſs-remainder; becauſe there is an expreſs eſtate, and therefore it ſhall not be taken by implication.

With reſpect to the caſe of *Gilbert* verſus *Witty* and others, *Cro. Jac.* 655. there were two reaſons againſt implying croſs-remainders in that caſe. The firſt, that it was a deviſe to three ſons ſeverally by expreſs limitation; and ſecondly, becauſe it is a univerſal principle, that there cannot be a croſs-remainder by implication between more than two. With reſpect to *Comber* verſus *Hill*, he took this diſtinction; that, in that caſe, the words "*all* and *every*" were omitted, and the word "*reſpective*" is not inſerted in the caſe in queſtion. The caſe of *Williams* verſus *Brown* is rather ſtronger in favour of the plaintiff, the words "all and every" being there made uſe of; but the chief ground upon which the court decided that caſe was the inſertion of the word "*reſpective.*" With regard to the caſe in *Atk.* 580. he ſaid it was ſufficient to obſerve, that the court determined it abſolutely upon the expreſſion in the will—to their "*ſeveral*" and "*reſpective*" iſſues.

The court took time to conſider.—Afterwards, on *Monday* the 16th of *May*, Lord *Mansfield* delivered the opinion of the court, which he introduced as follows:

I found it a cuſtom, in caſes ſent by the court of *Chancery* for our opinion, to certify it privately to the Lord Chancellor in writing, without declaring in this court either the opinion itſelf, or the reaſons upon which it was grounded. But I think the cuſtom wrong, as well as unſatisfactory to the bar: and therefore in the two caſes that now wait our certificate, and for the future, we ſhall declare our opinion in this court.

Our certificate in the preſent caſe is in theſe words—"There "are no words in the inſtrument, bearing date the 3d of *May* "1758, which intimate any intention to limit over the *reſpective* "ſhares of the two daughters dying without heirs of their bo-"dies *reſpectively*; on the contrary, the limitation over is of the "whole eſtate, limited to all the daughters, and is to take place, "on the expreſs contingency of *failure* of *all* and *every* the "daughter and daughters, and the heirs of their *body* and *bodies*; "and the limitation over on default of *ſuch iſſue* is, to the heir "at law. Conſequently we are of opinion, that as nothing is

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" given to the heir at law, whilſt *any* of the daughters or *their* " *iſſue* continue, they muſt amongſt themſelves take croſs-re- " mainders."

N. B. Lord *Mansfield* added, that the introductory words of " there being nothing in the inſtrument of *May* 3d, 1758, which " ſhewed the limitation over to the right heir was to take " place upon failure of *either* of the daughters and their iſſue " *reſpectively*," were emphatically put in, in anſwer to the caſes of *Comber* verſus *Hill*, and *Williams* verſus *Brown*, cited in the argument by Serjeant *Hill*; and in order to ſatisfy his doubts.

REX *verſus* CLARKE.

Saturday, April 23.

One, convicted of *playing* at *bowls*, upon the ſtat. 33 *Hen.* 8. *c.* 9. *ſect.* 16. is not puniſhable as a *diſorderly* perſon.

THIS was a conviction upon ſtat. 33 *Hen.* 8. *c.* 9. *ſect.* 16. in effect as follows:

" Be it remembered, that on, &c. *Samuel Powey*, and *Stephen* " *Bulling* of, &c. came before me *William Codrington*, one, &c. " and gave me to underſtand and be informed, that *Thomas* " *Clarke* of, &c. labourer, on the 16th of *Auguſt* 1773, did uſe " and play at a certain unlawful game with *bowls* and *pins*, called " *bowlruſhing*, with divers liege ſubjects of our ſaid lord the " king, and did then and there obtain and receive divers ſums " of money of the ſaid ſubjects playing at the ſaid game, againſt " the form of the ſtatutes in that caſe, &c. and againſt the peace, " &c. and pray that the ſaid *Thomas Clarke* may be convicted of " the ſaid offence: Whereupon afterwards, on the 8th of *Sep-* " *tember* 1773, the ſaid *Thomas Clarke* being apprehended and " brought before me, &c. to anſwer to the ſaid charge, &c. " the ſaid *Thomas Clarke* is aſked by me, if he can ſay anything " for himſelf why he the ſaid *Thomas Clarke* ſhould not be " convicted of the premiſes above charged upon him, &c. and " thereupon the ſaid *Thomas Clarke*, of his own accord, fully " acknowledges the premiſes, &c. to be true as charged, and " does not ſhew to me any ſufficient cauſe why he ſhould not " be convicted thereof. Whereupon all and ſingular the pre- " miſes, &c. being conſidered, and due deliberation being there- " unto had, I do adjudge and determine that the ſaid *Thomas* " *Clarke* is guilty of the premiſes, &c. and that the ſaid *Tho-* " *mas Clarke* is therefore an *idle* and *diſorderly perſon*, and is alſo " therefore a *rogue* and *vagabond*, within the true intent and " meaning of the ſtatutes in that caſe made and provided. And " the ſaid *Thomas Clarke* is accordingly by me convicted of the

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"offence charged upon him in and by the ſaid information, "and of being an *idle* and *diſorderly perſon*, and a *rogue* and "*vagabond* in form aforeſaid: and I do hereby adjudge and order "that the ſaid *Thomas Clarke* be therefore *committed* to the "houſe of correction, there to remain for the ſpace of *one month*, "being a leſs time than until the next general quarter ſeſſions "of the peace; or until the ſaid *Thomas Clarke* ſhall find ſuf-"ficient ſureties to be bound in recognizance to appear before "the next quarter ſeſſions, and for his good behaviour in the "mean time."

Mr. *Selwyn* laſt term took exception to this conviction, becauſe it was not alleged in the information that the playing at bowls was *out* of the defendant's *own orchard*, and it is only unlawful *ſub modo*: And the court upon this exception quaſhed the conviction.—Afterwards, in the ſame term, Lord *Mansfield* ſaid, a doubt had ariſen, whether, as by another part of the 16th *ſection* of ſtat. 33 *Hen.* 8. it is made unlawful for a *labourer* to play at any time *out* of *Chriſtmas*, the conviction was not good; as the defendant was ſtated to be a *labourer*, and the *playing* laid on the 16th of *Auguſt*. But, his lordſhip obſerved, the puniſhment appeared to be under the vagrant act, 17 *Geo.* 2. *c.* 5. *ſect.* 2. therefore deſired it might be ſpoken to again upon this new point, and alſo conſidered, whether it was a good adjudication under this latter ſtatute.

And now Mr. Juſtice *Aſton* (Lord *Mansfield* abſent) delivered the opinion of the court.

This conviction is a jumble and confuſion of charges and puniſhments. It is a conviction for playing at bowls, and the puniſhment inflicted is impriſonment as being an idle and diſorderly perſon. The ſtat. 33 *H.* 8. *c.* 9. *ſect.* 16. lays a penalty of 20*s.* on every labourer, *&c.* playing at bowls out of *Chriſtmas*. The puniſhment therefore is clearly not under this ſtatute. The ſtat. 17 *Geo.* 2. *c.* 5. *ſect.* 2. deſcribes *four* kinds of idle and diſorderly perſons: and being an explanatory act, we cannot go out of it. Now *bowling* is not an offence within any of theſe deſcriptions; conſequently the defendant is not puniſhable as an idle and diſorderly perſon. But the puniſhment here is under this latter ſtatute. Therefore we are all clearly of opinion that the conviction ought to be quaſhed.

Playing at bowls does not conſtitute an idle and diſorderly perſon within the proviſions of the ſtat. 17 *Geo.* 2. *c.* 5.

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NORRIS *verſus* TYLER.

Some day.

In an action for a malicious proſecution, verdict in favour of the *defendant* refuſed to be ſet aſide, tho' againſt evidence.

THIS was an action for a malicious proſecution in preferring a bill of indictment againſt the plaintiff for forging a note of hand. Four witneſſes were called to prove that the hand-writing was not the plaintiff's, and the judge directed the jury in his favour: But the jury found a verdict for the defendant. Upon a motion for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide, as being a verdict againſt evidence, and why a new trial ſhould not be granted, the court ſaid the defendant had been ſufficiently tried once, where the ſuit was of a criminal nature.

Motion denied.

JONES *verſus* RANDALL and Another.

Monday, April 25th.

Action lies to recover money won upon a wager, "Whether "a decree of the "court of Chancery "would be reverſed "or not on "appeal "to the "Houſe of "Lords;" unleſs the motive be *fraud* or other *turpis cauſa*.

ASSUMPSIT upon a wager, "Whether a decree of the "court of Chancery would be reverſed on appeal to the "Houſe of Lords." The decree was reverſed; whereupon the plaintiff brought this action, and obtained a verdict for fifty guineas, the amount of the wager laid.

Mr. *Dunning* had moved in arreſt of judgment: *Firſt*, Becauſe the event was not contingent, but certain; and *ſecondly*, becauſe the contract was illegal, being *contra bonos mores*.

Mr. *Wallace* and Mr. *Mansfield* now ſhewed cauſe; 1. This was a fair tranſaction between the parties, whoſe knowledge, or rather ignorance, reſpecting the event, left it equally uncertain in whoſe favour it would finally be decided. Therefore, as between them, it was certainly contingent. 2. It is not within any of the ſtatutes againſt gaming; and therefore, like all other bets which are not prohibited by poſitive law, recoverable by action. 3. With reſpect to its being illegal, there is no caſe in point; and therefore, if immoral, it muſt be decided to be ſo from the nature of the contract itſelf. But is it more immoral than a wager between two ſons upon the lives of their reſpective fathers, which was the caſe of the Earl of *March* v. *Pigot*, *Trin.* 11 *G.* 3. *B. R.* and adjudged a good and valid wager? There is no fraud; no impoſition imputed to either of the parties; no ſuggeſtion of any perſonal influence with reſpect to the de-

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ciſion; nor does it in itſelf import any *diſreſpect* to the judicature of the Houſe of Lords, but was meant by the plaintiff merely as a ſort of inſurance upon his cauſe; therefore there is no ground to ſay that this contract is in its nature an illegal contract.

Mr. *Dunning*, in ſupport of the rule, began by ſtating, that in *fact* it was an *uſurious* bet to prevent the plaintiff being ſent to gaol; but allowed that the court muſt decide upon the *record only*.

He admitted that this was not a caſe within any of the acts of parliament againſt gaming; nor did the idea of perſonal influence make any part of the ground of his objections: at the ſame time he inſiſted, that if ſuch a wager had been laid by a member of the Houſe of Lords, it would not have been competent to him to recover it. What was law therefore to one perſon, was law to every other perſon of whatever denomination.

But he ſaid, the queſtions upon this motion are two: *Firſt*, Whether this wager is fair? *Secondly*, Whether it is not void, as being contrary to *common decency?* It is eſſential to the validity of a wager that the event be *contingent*: But the laws of this country are clear, evident, and *certain*: All the judges know the laws, and, knowing them, adminiſter juſtice with uprightneſs and integrity. The event therefore was certain, and of courſe the wager ſuch, as in its nature was impoſſible to be loſt. 2. If the firſt ground of objection is a good one, it ſerves to illuſtrate and ſtrengthen the ſecond. For the contract in that caſe muſt ſuppoſe, either that the judges are ſo ignorant of the laws as not to know them, or, knowing them, are wicked enough to decide againſt their knowledge. A propoſition therefore, which draws with it ſo odious and diſgraceful a conſequence, is in itſelf ſo ſhamefully indecent and diſreſpectful, that it ought not to be countenanced or upheld.

Lord *Mansfield*.—This caſe muſt be decided upon the ſtate of it as it appears upon the declaration. It is there ſtated to be a wager made by the defendant who was the party appealing in a cauſe depending before the Houſe of Lords; and who, in caſe the judgment was reverſed in his favour, was to pay 50*l.* to the plaintiff; if it was affirmed, he was to receive 50*l.* He was willing therefore to receive ſomething if he loſt by the deciſion, and to pay the ſame ſum if the judgment were in his favour: The chances therefore were equal.

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The question upon this state of it is, Whether this contract is against law, and void upon the face of it?

It is admitted by the counsel for the defendant, that the contract is against no positive law: It is admitted too, that there is no case to be found which says it is illegal: But it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of *England* would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of *England*, which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or other of them.

Contracts not prohibited by *positive law*, nor adjudged illegal by *precedent*, may nevertheless be *void* as against *principles*.

The question then is, Whether this wager is against *principles?* If it be contrary to any, it must be contrary either to principles of *morality*; for the law of *England* prohibits every thing which is *contra bonos mores*; or, it must be against principles of *sound policy*; for many contracts which are not against morality, are still void as being against the maxims of sound policy.—With respect to the first question, Whether it is against morality? This contract is equal between the parties; they have each of them equal knowledge or equal ignorance: and it is concerning an event which, reasoning by the rules of *Predestination*, is to be sure so far certain, that it must be as it should afterwards happen to be. But it is a future event equally uncertain to the parties, whether the House of Lords would be of the same or of a different opinion with the Chancellor; the presumption, if any, rather against the person betting in opposition to the Chancellor's judgment.

No doubt there may be a wager of this kind under such circumstances as would render it immediately immoral, and change it into a crime; and of these there are some in the books; as in evasions of simony, where a person who wanted to be made a Bishop, conversing with the person who had most interest at Court upon the subject of a see that was then vacant, said, "I will bet you so much, naming a considerable sum, "that I have not the bishoprick." This was a mere colour to disguise what was the real intention of the party, which was, to purchase it. The contract in that case was clearly and manifestly corrupt, and therefore void. So if the present wager had been made with one of the Judges or with one of the Lords, it

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would have been a bribe. Or if it had been as Mr. *Dunning* ſtated it, merely a colour to cover uſury, then, notwithſtanding the diſguiſe of the wager, the moment the truth appeared it would remain to be governed by principles, as if the parties had really entered into ſuch a corrupt agreement. Again, if it had been a wager laid with either the attorney or counſel in the cauſe, it would have been an objection. But there is no fact of that ſort in this caſe; which is a tranſaction, that, as far as I can ſee, contains nothing either immoral or contrary to juſtice. As to the certainty of the law mentioned by Mr. *Dunning*, it would be very hard upon the profeſſion, if the law was ſo certain, that every body knew it: the misfortune is that it is ſo uncertain, that it coſts much money to know what it is, even in the laſt reſort.

The ſecond queſtion is, Whether this contract is againſt ſound policy? And ſuppoſing it clear of all the circumſtances beforementioned, ſuch as its being upon equal terms, without fraud, and with a view only of ſecuring ſomething to the appellant, in caſe the deciſion went againſt him, I profeſs that, even independent of thoſe circumſtances, I ſee no objection to it in ſound policy. From my own memory of this cauſe, if there ever was uncertainty in any caſe it was in this.

When a nice queſtion therefore is depending, it may be a point upon which even perſons in the profeſſion may differ; and if either they or any two other perſons bet about the deciſion, provided there be no fraud or colour in the caſe, I ſee no reaſon why they ſhould not do ſo. The preſent caſe being of that ſort, and not being prohibited by any poſitive law nor contrary to any principle of ſound policy or morality, I do not think we are at liberty to prevent the plaintiff from bringing his action to recover the money he has won, and therefore I am of opinion that the rule for arreſting the judgment ought to be diſcharged. The three other Judges concurred.

Tueſday, April 26th.

STATHAM *verſus* BELL.

Deviſe to a ſon of which the teſtator ſuppoſed his wife to be *enſient* at the time of making his will, *when he ſhould attain the age of* 21 *years*, but if a *daughter*, then one *moiety* of his eſtate to his *wife*, and the other moiety to his *two* daughters (there being one alive at that time) when they ſhould attain their ages of 21, with ſurvivorſhip as between the daughters: if both die before 21, their moiety to go to the wife and her heirs for ever; if ſhe died, *her ſhare* to go *to them*. The wife proved *not* to have been *enſient*: the teſtator died, and ſo did the *daughter* without iſſue and *under age*. The wife ſhall take the *whole eſtate*.

THIS was a caſe out of Chancery upon the conſtruction of a will; the ſubſtance of the facts ſtated was as follows: "That ——— *Statham* being ſeiſed in fee of the meſ-

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" ſuages in queſtion, made his will, by which, among other " things, he there ſays:—Whereas my wife is now pregnant, " if ſhe bring forth a ſon, I will that he ſhall inherit my eſtate " at twenty-one years old; paying 4 *l.* a year to my wife and " 30 *l.* a year to my daughter, at her coming to the age of twenty-" one years, and 10 *l.* more to her on the death of my wife: " but if it be a daughter, I give one moiety to my wife, and " the other to my two daughters to be divided between them, " and to be given them at the age of twenty-one years. If " either die before that time, the ſurvivor to have her ſiſter's " ſhare: if both die before that time, I give both their ſhares " to my wife and her heirs for ever. If ſhe die, then I give her " ſhare to my two daughters. The teſtator died leaving his " widow and an only child, a daughter; the teſtator's wife " was not enſient at the time of making the will, nor at the " time of the teſtator's death. The daughter died under age, " and without iſſue.—The queſtion ſtated for the opinion of " the court was, whether the wife took any, and what eſtate " under this will, no child being born?"

Mr. *Kenyon* for the plaintiff.

The ſingle queſtion is, whether it was the intention of the teſtator, that in the event which has happened the wife ſhould take the whole eſtate? He inſiſted ſhe ſhould not, but upon the precedent condition expreſſed in the will, *viz.* the birth of a ſecond daughter, and the death of both without iſſue, which condition was not performed, and therefore ſhe could not be entitled. For if a ſon had been born, he was to take the whole eſtate, ſubject to the incumbrances charged upon it. If a daughter, one moiety only was to go to the wife, and the other moiety to the two daughters; and if both daughters died without iſſue, then the wife was to have the whole; therefore he did not intend that in *all* events the eſtate ſhould go to his wife; but only upon a *particular* contingency, which contingency has not happened. *Comberbach* 437. *Eſtcott* verſus *Warry*.—*S. C.* 2 *Eq. Caſ. Abr.* 361. under another name. " Deviſe of a term to " an infant in *ventre ſa mère*, if it ſhould be a ſon; and if it " ſhould be a ſon and die under age, then to the teſtator's grand-" ſon. It proved a daughter, and it was adjudged upon ſpecial " verdict, that the executrix, and not the grandſon, ſhould " have the term; becauſe the grandſon was not to take but upon " a precedent contingency, *viz.* the birth of a ſon, which did not

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"happen." So here the precedent condition, *viz.* the birth of a daughter, has not happened, and therefore the wife is not entitled.

Again 2 *P. Williams* 390. *Davis* v. *Norton.* "Deviſe to *B.* "in tail general, and if *B.* die without iſſue in the life-time "of the teſtator's wife, then the wife to have the premiſſes for "life, remainder to *C.* in fee. *B.* dies without iſſue, but the "teſtator's wife dies before *B.* Adjudged by *Reynolds* Juſtice, "that the remainder limited to *C.* is a contingent remainder, "depending upon the death of *B.* without iſſue in the life of "the teſtator's wife; and as that contingency never happened, "the remainder which depended thereon could never ariſe." So here, the limitation to the wife depended upon the birth of a daughter, and the death of ſuch daughter without iſſue, but that contingency has not happened, and therefore the wife cannot be entitled.

Both the above caſes are exactly in point. The caſe of *Jones* verſus *Weſtcomb* may be cited againſt the plaintiff; but in that caſe there was an immediate bequeſt to the wife: here there were contingencies to ariſe firſt; neither of which have happened.

Mr. *Davenport* for the defendant *contrà*.

Upon the natural conſtruction of the words of this will, it was clearly the manifeſt intention of the teſtator not to leſſen the benefit of the wife if ſhe ſhould prove not to have been enſient; but in caſe he ſhould die leaving no ſon, or a daughter or daughters who ſhould not ſurvive his wife, or leave iſſue, then that his wife ſhould take the whole eſtate. If ſo, in the event which has happened, ſhe is clearly entitled notwithſtanding the contingency, upon which the ſubſequent limitation was to ariſe, has not taken place. There are many caſes where words full as conditional and contingent as the preſent have nevertheleſs been conſtrued to be words of limitation. So was *Holcroft*'s caſe, *Moore*, 486, 7. "Deviſe to the uſe of the firſt ſon of Sir *John* "*Holcroft* in tail, and ſo to the ſecond, third, and fourth ſons "ſucceſſively. And if it fortune the ſaid *fourth* ſon to die "without iſſue, remainder over to *Hamlet Holcroft* with di- "vers limitations over:" Sir *John Holcroft* never had but *one* ſon. The queſtion was, whether the ſubſequent uſes could ariſe? and it was held by the court that they could, for the words amount to no more than a limitation of the eſtate; and are not a condition precedent to the eſtate of *Hamlet*. *Jones*

verſus *Weſtcomb.* *Prec. Chan.* 316. 3 *Lev.* 125. 2 *Str.* 1092: to the ſame point. And he obſerved there were repeated inſtances in which words of condition have been conſtrued as limitations inſtead of contingencies; the lateſt in point of time is *White* verſus *Barber*, *Eaſter* term 1771: there the deviſe was, to ſuch child or children as the teſtator's wife ſhould happen to be enſient with at the time of his death: The teſtator had only one ſon at the time of making his will; two were born after the will was made, and before his death: but his wife was not enſient at the time of his deceaſe; yet the court held, "it "was manifeſtly his intention to comprehend all the children "which ſhould be born of his then wife, whether before, or "after his deceaſe."—In the preſent caſe, the intention is apparent, that if a ſon had been born, he was to take the eſtate, but in caſe of a daughter and general failure of iſſue before 21, the wife was to take the whole. In either event therefore the deviſe in the preſent caſe would take place; as an executory deviſe, if the contingency had happened, or as an immediate limitation upon the contingency which has failed.

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The court took time to adviſe.

Afterwards, on the 16th of *May*, Lord *Mansfield*, having firſt ſtated the caſe at large, delivered the unanimous opinion of the court as follows:

"Our opinion is in theſe words: It was the plain intention "of the teſtator, that in caſe no ſon ſhould be born, and he "ſhould have no daughters who ſhould live to the age of twenty-"one years, that the wife ſhould have the whole eſtate: and in "the event which has happened ſhe is ſo entitled."

His Lordſhip added, that the facts of this caſe differed from the famous caſe of *Jones* verſus *Weſtcomb*. For here it was clear, that if the teſtator had died during the pregnancy of his wife, the eſtate would have deſcended to the heir at law in the mean time.

GOODTITLE ex dim. HART *verſus* KNOT.

Tueſday, April 26th.

Deviſe of particular lands in aid of the teſtator's perſonal eſtate.

THIS was an ejectment brought to recover certain lands in the pariſh of *Alderchurch* in the county of *Lincoln*, to which the leſſor of the plaintiff claimed to be entitled as

to truſtees, for the payment of debts, legacies, and funeral expences, "*All the reſt, reſidue, and remainder* of his real and perſonal *eſtate* to his wife, her heirs, executors and adminiſtrators."—The perſonal eſtate is ſufficient. The *lands deviſed in aid*, paſs to the wife under *the reſiduary clauſe*. So if the perſonal eſtate had proved deficient in *part* only, the wife would have been entitled to the remainder.

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heir at law of *James Humberton*: And on the trial a verdict was found for the plaintiff, for a moiety of the premiſes in queſtion.

Upon a motion to ſet aſide this verdict, it was ordered by conſent of parties, that the verdict ſhould be ſubject to the opinion of the court upon the following caſe:

"The teſtator *Humberton* being ſeiſed in fee of the premiſes "in queſtion, and of other lands, partly in poſſeſſion, and "partly in reverſion, after the death of his wife; by his will, "after ſeveral precedent deviſes and bequeſts, gave and de-"viſed as follows:" "In caſe my perſonal eſtate, excluſive of "ſuch part thereof as I have before given and bequeathed to my "wife, ſhall not be ſufficient to pay all my debts, legacies, and "funeral expences; I hereby give to *Matthew Kenrick* and "*William Reeve* and their heirs, all my lands and eſtates at "*Alderchurch* in the county of *Lincolnſhire*, UPON TRUST to "ſell and diſpoſe of the ſame as ſoon as conveniently may be "after my deceaſe; and the money ariſing from ſuch ſale, I "will and direct ſhall go, and be applied towards making "good any deficiency as ſhall happen in my perſonal eſtate; "and if after ſuch ſale the money ariſing thereby ſhall in any "reſpect be deficient, I do then ſubject and make liable the "reverſion of my lands ſettled in jointure upon my wife to make "good the ſame. The teſtator concludes thus: And laſtly, all "the *reſt*, *reſidue*, and remainder of my real and perſonal eſtates "whatſoever and whereſoever, I give, deviſe, and bequeath to "my ſaid dear and loving *wife*, her heirs, executors, and ad-"miniſtrators; and I conſtitute her my ſole *executrix*."

The teſtator died ſoon after, without altering his will, leaving the leſſor of the plaintiff, and *William Blunt*, his heirs at law.—After his death the will was proved, and out of his *perſonal* eſtate all his *debts* and *legacies* were *paid*, and there was no occaſion to call in the aſſiſtance of the real eſtate. The queſtion was, "Whether the plaintiff as co-heir was entitled to recover "the lands and eſtate at *Alderchurch*?"

Mr. *Wilſon* for the plaintiff. The queſtion depends upon, Whether the teſtator intended to compriſe the premiſes in queſtion in the reſiduary clauſe? He argued that the teſtator did not intend to compriſe them, and if he did not, then the widow is not entitled, but they deſcend to the heir at law. He cited *Roe* verſus *Flood*, *Forteſcue* 184. and *Wright* verſus *Hall*, there cited, and 1 *P. Will.* 302.

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Mr. *Cuſt* for the defendant. Upon the whole will there is no title in the heir at law: For the intention of the teſtator is clear, that his heir at law ſhould not have the eſtate. In *Roe* v. *Flood* it was held, that the eſtate did not paſs under the reſiduary clauſe, becauſe it was a *lapſed deviſe*; and the court ſaid, that reſidue muſt be expounded to mean reſt and reſidue of the teſtator's lands undeviſed at the time of making his will, not, at the time of his death. But the queſtion in this caſe is, whether lands deviſed upon a contingency which never happened, ſhall paſs by this reſiduary clauſe? In ſupport of which, he cited *Sprigg* v. *Sprigg*, 2 *Vern.* 394. deviſe of lands to executors to be ſold, and thereout to pay 500 *l.* to *A.* if he return from beyond ſea; the reſidue to *B.* *A.* died before the teſtator. *Per* Lord *Keeper*: The deviſe of 500 *l.* to *A.* if he be living, and ſhall return from beyond ſea, is a contingent deviſe and on a condition precedent, which not happening, is as if never given. *Bethel* v. *Holmden* in *canc. Mich.* 1772. *Jones* v. *Weſtcombe* to the ſame point. But, he relied on the caſe of *Cliffe* v. *Gibbons*, 2 Lord *Raym.* 1324. as a caſe in point. There, *A.* by will directed all his debts and funeral expences to be paid as ſoon as conveniently could be after his death, and gave a power to his wife to ſell, if need be, his lands, *&c.* for that purpoſe, and then to pay his legacies, amongſt which he gave one of 1000 *l.* to his wife, and the reſidue of his eſtate after debts and legacies paid he gave to his wife. Lord *Cowper* was clearly of opinion that a fee paſſed by the deviſe of all the reſt and reſidue to the wife after payment, *&c.*

Lord *Mansfield* after ſtating the caſe ſaid, I think this an exceedingly plain caſe. There are two lights in which it may be conſidered: *Firſt*, Whether in the event which has happened there is any deviſe at all of the premiſes in queſtion? If there is not, they go by the reſiduary clauſe to the widow; for there are other eſtates deviſed; ſo that reſt and reſidue is applicable to the other eſtates that are ſo deviſed: and I am of opinion that they certainly are not deviſed at all; for the teſtator ſays, "In *caſe* my perſonal eſtate ſhall not be ſufficient, *then* I deviſe "*&c.*" He dies; his perſonal eſtate is more than ſufficient; therefore he has deviſed nothing.

But *Secondly*, I will ſuppoſe the perſonal eſtate had been a *little* deficient, and that there had been occaſion to make uſe of this deviſe to pay part of the debts, and that in conſequence

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of it they had been diſcharged. In the caſe I have put, the deviſe would have once taken effect, and there would have been a *reſulting* truſt for ſomebody, ſubject to the charge ſo brought upon it. The queſtion would then be, whether in this caſe the heir at law could recover? One objection which has been taken is that the *legal* eſtate is in the *truſtees*, and therefore the *heir* at law cannot recover in this ejectment. In anſwer to that objection it has often been determined that an eſtate in truſt merely for the benefit of the *ceſtuy que truſt*, ſhall not be ſet up againſt him; any thing ſhall rather be preſumed: nor ſhall a man defend himſelf by any eſtate which makes part of the title of the leſſor of the plaintiff. Now if the truſtees had paid this charge, they would then have become truſtees for the perſons entitled to the *ſurplus* after ſuch payment. Therefore if the heir at law be that perſon, the objection being upon a ground which makes part of his title, it ſhall not be ſet up againſt him. The queſtion therefore turns ſingly upon the conſtruction of the will. Let us ſee then what the deviſe in the will is? It is a truſt originally, and in ſubſtance a charge on land; which land is deviſed ſubject to raiſe by ſale or mortgage as much money as is neceſſary for the payment of debts, legacies, and funeral expences. It is therefore in ſubſtance and equity a deviſe of a charge upon the eſtate; which may be diſcharged by payment of the incumbrance upon it: or, if not wanted, will reſt in the ſame ſtate as if it had not been made ſubject to ſuch incumbrance. This brings it very near the caſe of *Cliffe* v. *Gibbons*, 2 Lord *Raym.* 1324-5. It is land before deviſed upon which a perſonal charge is let in; therefore the words, "All the reſt of the land," neceſſarily make it come within the reſiduary clauſe. If it had been ſold, after payment of what was wanted, the reſt of the money ariſing from ſuch ſale of courſe muſt go to the perſon, to whom under the reſiduary clauſe the land was to go, ſubject to ſuch payment and diſcharge. Therefore in either caſe the widow is entitled. The three other judges concurred.

Per Cur. Poſtea delivered to the defendant.

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MEASE, Executrix, *verſus* MEASE.

Tueſday, April 26th.

Debt upon a bond, conditioned for payment at a certain day. Plea, that it was given as an indemnity to the plaintiff's teſtator againſt another bond, bad.

THIS was an action of debt upon bond conditioned for payment at a certain day. Plea, that it was given as an indemnity to the plaintiff's teſtator againſt another bond, and not damnified. Demurrer.

The Queſtion was, Whether the agreement ſtated in the plea could be given in evidence againſt the expreſs condition of the bond?

Mr. *Wilſon* for the plaintiff. The plea is clearly bad, and the agreement cannot be given in evidence; it being ſettled that no parol evidence can be given to abate or extend a bond or deed. Lord *Bacon's Elem. Law, Regula* 23. *p.* 82. *Cro. Eliz.* 697. 1 *H.* 7. 16. 8 *Co.* 155. *Fitzg.* 73. 2 *Wilſ.* 347. *Meres* v. *Anſell*, reported ſince in 3 *Wilſ.* 275.

Mr. *Davenport* contrà. The plea is founded in truth and fact.

Lord *Mansfield* interrupted him. If the fact is true, it is a proceeding by the plaintiff contrary to the agreement, and the court would incline to get at it in another form. I think therefore it would be better to make a motion to ſtay proceedings upon affidavit, and let it ſtand over; if upon motion the court ſhould be againſt the defendant, he muſt pay coſts, and judgment upon the demurrer ſhall be final. The plea is clearly bad.

After ſome aſſertions from the attorney for the plaintiff, Lord *Mansfield* ſaid, let there be judgment for the plaintiff.

COLTON *verſus* SMITH.

Wedneſday, April 27th.

Preſcription as lord of the manor for toll of all goods landed *within* the *manor*, in conſideration of *repairing* a *wharf* within the manor, not confining it to the wharf, is good.

THIS was an action for a toll for a wharf in *Gainſborough*. One count in the declaration ſtated, that the plaintiff was lord of the manor, and that he and all thoſe, &c. had immemorially uſed to keep and repair a wharf within the manor; and, in conſideration thereof, had received toll of all goods landed within the manor; not confining it to the wharf. There was another count claiming a toll without ſtating any conſideration at all. Verdict for the plaintiff.

Serjeant *Hill* had moved in arreſt of judgment, becauſe the conſideration ſtated in the firſt count was inſufficient in law; and a conſideration

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consideration being expreſſed, the court would not preſume any other than the conſideration ſo ſet forth.

COLTON verſus SMITH.

Mr. *Wallace* now ſhewed cauſe. The caſe of *Criſpe* v. *Bellwood*, 3 *Lev.* 424. is preciſely this caſe. The plaintiff's anceſtor there claimed the very toll in queſtion, exactly upon the ſame ground of conſideration, and the court then held it was a good one. Only two caſes have occurred ſince. *Wilkes* v. *Kirby*, 2 *Lutw.* 1519. in which caſe there was no deciſion, but only a *quære* made by C. J. *Treby*: 2dly, *Trueman* v. *Walgham*, 2 *Wilſ.* 293. which was clearly a caſe of toll thorough; and therefore diſtinguiſhable from the preſent toll, which being claimed upon all goods landed within the manor, in conſideration of *repairing* a public wharf, is in the nature of a toll traverſe, where no conſideration in fact is neceſſary.

In toll traverſe no conſideration is neceſſary.

Serjeant *Hill* agreed, that the caſe in 2 *Wilſ.* 293. was a toll thorough, where a conſideration was neceſſary to be laid; and admitted that in a toll traverſe, as here, no conſideration was neceſſary, becauſe it is implied. But he inſiſted that as the plaintiff had thought fit to lay a conſideration and to make it part of his preſcription, the conſideration, as laid, ought to be ſufficient in law: but this was not; for no conſideration is binding upon a third perſon unleſs he receive the benefit of it, and here every body who pays has not the benefit of it. As to the caſe in 3 *Lev.* 424. it is not this toll; and that caſe is no where reported, or even cited, but in 2 *Lev.* 96.

Lord C. J. *Treby* in *Lutwytche* makes a *quære* if ſuch a conſideration be good.

Lord MANSFIELD. In this caſe every body that pays *has* a benefit; for if they go to the wharf they have the benefit of it, and if they land their goods elſewhere within the manor, they land upon the plaintiff's private property. The *quære* made by Lord Ch. J. *Treby*, in *Lutwyche*, is rather againſt the defendant here; for it is, *quære* if *not* well alleged, and the plea good? Which ſhews he inclined to think it was. In the preſent caſe the landing is upon the plaintiff's private property, and in 3 *Lev.* 424. the court held the conſideration good.

The three other judges concurred. *Per Cur.* Judgment for the plaintiff.

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Friday, April 29th.

THIS was an action of treſpaſs: Plea 1ſt. Not guilty: 2d. A juſtification under an authority from *Joſeph Calverly* the ſurviving deviſee of the lands in queſtion, under a will made by *Nicholas Newenden* dated 7th *Auguſt* 1759, upon the validity of which will iſſue was taken.

One having made his will and a duplicate thereof, delivers the duplicate to *A.* afterwards he makes another will, by which he revokes all former wills, and at the ſame time *cancels* that part of the *former* will which was in his *own* cuſtody. Before his death he ſends for an attorney to make a *third* will, but is ſenſeleſs before he arrives. After his death, the *firſt* and ſecond will are found *together* in a paper *both cancelled*; but the *duplicate* of the firſt is found *uncancelled* amongſt his other deeds and papers. The act of *cancelling* the *latter* will does not *ſet up* the *duplicate* of the *former*.

The cauſe was tried at the laſt *Lent* aſſizes for *Suſſex*, when a verdict was given for the plaintiff, ſubject to the opinion of the court upon a caſe ſtated, the ſubſtance of which was as follows:

That *Nicholas Newenden*, on the 7th of *April* 1759, duly made and executed his laſt will and teſtament, and at the ſame time executed a duplicate. *At the time* of making his will of 1759, he told one of the witneſſes that the will was made in order to make his wife eaſy. Afterwards, he ſaid it was not a will to his liking, and that he ſhould alter it if he lived. *Nicholas*'s wife died ſoon after: That the teſtator, upon the 7th of *May* 1761, fetched one part of the old will down ſtairs to have it altered, and then duly made another will of that date: In this will the deviſes were different from thoſe in the will of 1759*. That *Nicholas*, after executing this latter will, took the ſaid one part of the old will in his hands, tore off his name and ſeal, and directed Mr. *Sampſon*, the perſon who had made the new will, to cut off the names of the witneſſes to the old one; which he did in the teſtator's preſence: and at the execution of this ſecond will, he ſaid, he made it in order to give *Mary Engliſh*, a deviſee in the firſt, a greater portion; for otherwiſe Mrs. *Weſton*, another deviſee in the firſt, would have more than her ſhare. That he delivered this latter will to Mr. *Sampſon*, who lived at about twenty miles diſtance, deſiring him to carry it to his houſe and keep it; at the ſame time, he aſſigned as a reaſon for ſuch requeſt, that if his heir at law *Ann Newenden*, or his daughter *Weſton*,

* *N. B.* The bequeſts themſelves made no queſtion in the caſe; the only material circumſtance was, that the deviſes in the latter will, varied from thoſe in the former.

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ſhould find it, they might deſtroy it. Said there was a duplicate of the will of 1759, in Mrs. *Weſton*'s cuſtody; but would keep *this*, meaning his laſt will, as private as he could. Mrs. *Weſton* lived about ten miles diſtant from the teſtator, but was in the houſe when the ſearches were made after his death. That *Anne Newenden* lived with the teſtator, and was about eighteen years old when he died. That *Mary Engliſh* died in the life-time of the teſtator. That, ſometime after her death, he ſent to Mr. *Sampſon* the following note—"Sir, I pray you to "ſend me the will which you have of mine."—A ſecond note was ſent on the 14th of *April* 1762.—"Pray ſend me the will by "the newſman."—That, in conſequence of this note, *Sampſon* ſent back the will of 1761 to the teſtator, who, before his death, ſent to Mr. *Wheeler* an attorney, to come and make another will; who accordingly came in about an hour's time; but the teſtator had then loſt the uſe of his ſenſes, and died on the 28th of *December* 1762. That two ſearches were made in the teſtator's cabinet and boxes after his death, the keys of which were in *Anne Newenden*'s poſſeſſion; and *one part* of the will of 1759, and the will of 1761, were found *together* in a paper, both cancelled. The *other* part of the will of 1759 was found *uncancelled* in the teſtator's room, amongſt other deeds and papers.

The queſtion for the opinion of the court upon theſe facts, was, "Whether the teſtator died inteſtate or not; that is, "Whether the will of 1759 was revoked?"

For the plaintiff, who claimed under the heir at law, it was inſiſted, that the will of 1759 was abſolutely and completely revoked by the act of the teſtator in cancelling that part of it which was in his cuſtody, notwithſtanding the duplicate remained whole and uncancelled: And ſo it was held in Sir *Edward Seymour*'s caſe, cited by Lord *Cowper*, in *Onions* verſus *Tyrer*, 1 *P. Wms.* 346. 2 *Vern.* 743. *Secondly*, being a *duplicate* only of a will already *cancelled*, it cannot be ſet up again, but by an *actual republication*: For, ſince the ſtatute of frauds, there can be no ſuch thing as an *implied republication*. 2 *Eq. Caſ. Ab.* 768-7. marginal notes: *Com. Rep.* 383-4. cited *arg.* in *Acherley* verſus *Vernon*. 3 *Bur.* 1496. 1 *Ves.* 191. 1 *Wilſ.* 310. In the preſent caſe, not only no *act* of republication is ſtated, but no *appearance* of any *intention* in the teſtator to re-eſtabliſh his firſt will, can be collected from the facts found: On the contrary it is manifeſt, that he was uniformly diſſatisfied with the diſpoſition he had there made, from the time he executed it to the hour of his death.

For,

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For the defendant *contra*: That the will of 1759 was *not revoked*. For the caſe ſtates that the will of 1759 was a *ſubſiſting will* at the time of the teſtator's death, and in his own poſſeſſion at that time. It is found likewiſe, that the will of 1761 was cancelled. By that act therefore, the will of 1759 is again ſet up, notwithſtanding the clauſe in the will of 1761, revoking all former wills. This doctrine is expreſsly laid down in *Glazier* verſus *Glazier*, ſince reported in 4 *Bur.* 2514.—"Teſtator made two wills; both found to have been in his cuſtody at the time of his death.—The *ſecond* was *cancelled*, the *firſt*, *uncancelled*.—It was there argued, that the act of *making* the *latter*, was a *revocation* of the *former*, and the *ſecond* being *cancelled*, the teſtator muſt be held to have died inteſtate. But, *per cur.* "Such revocation is itſelf *revocable*, and being *can-*"*celled* by the teſtator, it has no effect; no operation at all: "The *firſt* will therefore ſtands good."

With regard to the queſtion, whether the cancelling of one part of a will is a cancelling of the duplicate, in ſome caſes it may be ſo held; as where the duplicate is in the poſſeſſion of a perſon whoſe intereſt it might be to keep it from the teſtator, or where there is an actual withholding it from him, or where neceſſary impediments lie in his way, and prevent his gaining the poſſeſſion of it.—But in the preſent caſe, it is expreſsly ſtated that the uncancelled part was found among the teſtator's other deeds: He had therefore full power to deſtroy or preſerve it; and having done the latter, with the knowledge of the ſecond being cancelled, it is ſtrong evidence that he meant it ſhould ſtand as his laſt will.

The circumſtance of the firſt will being cancelled, makes no alteration, but it is equally revived by the ſecond being cancelled: and ſo it was held in *Onions* verſus *Tyrer*. 1 *P. Wms.* 345. reported likewiſe in 2 *Vern.* 743. and *Pre. Chan.* 459.—'One made his will.—Afterwards he made a ſecond will, by which he revoked all former wills, and directed the firſt to be *cancelled*, which was accordingly done: This latter will was not duly atteſted to paſs real eſtates. The queſtion was, "whe-"ther under theſe circumſtances the teſtator did not die in-"teſtate?" But the court held that the ſecond will not being duly atteſted, was a nullity, and did not revoke the former, which therefore was good.' The preſent however is a much ſtronger caſe: For here there was a *deliberate cancelling* of the

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ſecond will by the teſtator himſelf: Not a *mere legal defect* in the inſtrument.

Again, it is clear from the facts found in the ſpecial verdict, that the teſtator never intended to die *inteſtate*, which is *material*, as againſt the claim of an *heir* at law; and ſo was Lord *Cowper's* opinion in the caſe of *Onions* verſus *Tyrer*, 1 *P. Wms.* 345. before cited; where he ſays, "tho' the firſt will was ordered by the teſtator to be cancelled, and the ſame was in fact cancelled, yet all this being upon a preſumption that the latter will was good and duly executed, it is properly *relievable* under the head of accident." 1 *P. Wms.* 345.

It was ſuggeſted that the parties were willing to have a ſecond argument, if the court entertained any doubt.

Lord *Mansfield*. I believe we none of us have the leaſt particle of doubt in this caſe. I ſee no new light that can be thrown on the ſubject; there is no caſe in point; and the principles of law are clear enough. Since the ſtatute of frauds, a will cannot be revoked, but by an inſtrument executed according to the ſolemnities required by that ſtatute; or by burning, cancelling, tearing, or obliterating the ſame by the teſtator himſelf, or by his directions.

The mere act of *cancelling* a will is no *revocation*, unleſs done *animo revocandi*.

With reſpect to the *revocation* of a will by the act of *cancelling*, it is in itſelf an equivocal act; and, in order to make it a revocation, it muſt be ſhewn *quo animo* it was cancelled. For, unleſs that appears, it will be no revocation. As, if a man were to throw the ink upon his will, inſtead of the ſand; tho' it might be a complete defacing of the inſtrument, it would be no cancelling; or ſuppoſe a man, having two wills of different dates by him, ſhould direct the former to be cancelled; and through miſtake the perſon ſhould cancel the latter: ſuch an act would be no revocation of the laſt will: or ſuppoſe a man, having a will conſiſting of two parts, throws one unintentionally into the fire where it is burnt; it would be no revocation of the deviſes contained in ſuch part. It is the intention, therefore, that muſt govern in ſuch caſes; and that was the ground of the determination in the caſe of *Onions* verſus *Tyrer*, 2 *Vern.* 743. upon the mention of which, in the argument, I thought that ſomething remained, which was not ſtated. The whole queſtion there turned upon the *act* of *cancelling*, being under a *miſtake*. Indeed there was ſome doubt upon the evidence, whether the firſt will was cancelled at all: But Lord *Cowper* there ſays, ſuppoſing the firſt will had been cancelled, the teſtator did

did not mean to do ſo; Why? becauſe the deviſes in the ſecond will were preciſely the ſame as thoſe in the firſt, and to the ſame perſon. He did it therefore upon a ſuppoſition, that he had executed the latter according to the ſtatute of frauds; not with a deſign to revoke the deviſes as to the real eſtate. It is clear, therefore, that the ground of the determination in that caſe, was, its being a *cancelling* by *miſtake*; not that the firſt will was revived for want of the latter being duly ſubſcribed by the witneſſes. The books make Lord *Cowper* add (which would perhaps be difficult to maintain) "that even though the *law* held this to be a *revocation*, yet, under the head of *accident*, a court of equity would relieve." To be ſure, in order to explain any ſuch act of cancelling, tearing or defacing, *&c.* as I have before mentioned, parol evidence muſt be let in. 1774. BURTENSHAW *verſus* GILBERT.

But ſee how ſtrong a caſe the preſent is, as to the teſtator's *intention* to revoke. At the very time of making his firſt will, he expreſſes his diſſatisfaction at it; and adds, that he meant to alter it if he ſhould ſurvive his wife, becauſe Mrs. *Weſton* would take more under it than he intended ſhe ſhould do. He perſiſts in the ſame intention after the death of his wife, and executes it by a new will in 1761, which is a complete, legal, and effectual will; and if he had died immediately after, whether he had cancelled the former, or not, it would have been revoked; becauſe at the end of the ſecond will, there is a declaration by which he revokes all former wills. Beſides this, he deliberately cancels that part of the will of 1759 which he had in his own poſſeſſion; and by the evidence it is clear, that he had not the duplicate in his poſſeſſion at that time; for he mentions that it was in the hands of Mrs. *Weſton*; and the reaſon appears, why he could not well get at it, from the circumſtance that induced him to give Mr. *Sampſon* the care of the ſecond will: namely, that if *Ann Newenden* or Mrs. *Weſton* ſhould get at it they might deſtroy it.

The facts are too many and too ſtrong to admit of a queſtion, but that, at the time of making the ſecond will, the firſt was upon every principle of law clearly revoked, and can never be ſet up again but by a new will. It is however contended, that there are circumſtances which are equivalent in this caſe to a new will; and they are theſe: that *Mary Engliſh*, a favourite deviſee under the will of 1761, died: By her death his intentions under that will were defeated; and being ſo, he had cancelled it. Further, that he had it in view to make a new will, and there-

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fore, there is the ſtrongeſt evidence of his intention not to die inteſtate; but he is ſpeechleſs before he can accompliſh it. Be it ſo: but he had actually cancelled the will of 1759. Why then is the diſpoſition in that to be ſet up in preference to any other, or even to that made under the will of 1761? It does not appear *when* he cancelled the will of 1761, but he did it ſo leiſurely, that he put it up together with the will of 1759; and the reaſon, as it appears, for his doing ſo, was, becauſe he meant to make another will. It ſeems however upon ſearch that the other part of the will of 1759 had come from Mrs. *Weſton*'s, and was found amongſt the teſtator's papers. How did it come there? With what view? Upon what meſſage? Under what circumſtances? Whether the teſtator ſent for it, or not, we are all in the dark. The jury it is true have not found that it was put there after his death, but they have not found how it came there, nor was any thing ſuggeſted about it at the trial. It being therefore in the poſſeſſion of the teſtator, nobody knows how or why, there is no colour for its being ſet up after the former part was cancelled. It is a very ſtrong, and a very plain caſe.

Where there are duplicates of a will, one in the cuſtody of the teſtator, the other not; and the teſtator cancels that which is in *his* cuſtody, it is an effectual cancelling of both.

Aſton Juſtice. If the duplicate of the will of 1759 had ſtill remained in the hands of the perſon to whoſe cuſtody it was originally entruſted, yet the cancelling that part which the teſtator had in his own poſſeſſion would have been a ſufficient cancelling of ſuch duplicate.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred. *Per Cur.* Let the poſtea be delivered to the plaintiff.

Tueſday, May 3d. Treſpaſs on the caſe lies by a maſter for ſeducing his *journeyman.*

HART *verſus* ALDRIDGE.

THIS came before the court on a caſe reſerved upon the following queſtion; Whether under the circumſtances of this caſe the plaintiff was entitled to recover?—It was an action of treſpaſs on the caſe for enticing away ſeveral of the plaintiff's *ſervants* who uſed to work for him in the capacity of journeymen ſhoemakers. The jury found that *Martin* and *Clayton* were employed as journeymen ſhoemakers by the plaintiff, but for no determinate time but only by the piece, and had at the time of the treſpaſs laid each of them a pair of ſhoes unfiniſhed; that the defendant purſuaded them to enter into his ſervice and to leave theſe ſhoes unfiniſhed, which they accordingly did.

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Mr. *Darell*, for the plaintiff, ſtated it to be a queſtion of common law, and that the only point for the opinion of the court was, "Whether a journeyman was ſuch a ſervant as the law takes "notice of?" In ſupport of which propoſition he inſiſted that a journeyman is as much a ſervant as any other perſon who works for hire or wages; that neither in reaſon nor at common law is there any diſtinction between a ſervant in one capacity or another, and that the injury of ſeduction is in all caſes the ſame, though the recompence in damages may be different. To ſhew that an action lay at common law for taking a ſervant out of his maſter's ſervice, he cited *Broke Abr. tit. Action ſur le caſe, pl.* 38. 11 *Hen.* 4. 23. *pl.* 46. In *Fitzherbert*, 168. D. it is laid down, that "if a man take an infant or other out of another's "ſervice, he ſhall be puniſhed, although the infant or other were "not retained." In *Brooke, tit. Lab. p.* 21. a diſtinction is taken between the taking a ſervant out of his maſter's ſervice, and the procuring him to depart or retaining him after a voluntary departure, being appriſed of his firſt retainer: In the two laſt of which caſes, an action on the caſe is the proper remedy; in the former, treſpaſs, at common law. But he inſiſted that in no caſe had there ever been a diſtinction taken with reſpect to the *time* for which a ſervant might be hired; nor indeed before the ſtat. 5 *Eliz. c.* 4. was any preciſe time neceſſary; the object of which ſtatute was very different from the queſtion before the court. He preſſed the argument *ab inconvenienti*, ſtating that it would be of great detriment to the town, where the whole trade was in a great meaſure carried on by this ſort of ſervant.—That the verdict had found the defendant to be appriſed of the retainer of the ſervants, it being in proof that he had deſired them to leave their work then in hand unfiniſhed.

Mr. *Willes contra*. The ſingle queſtion is, Whether the enticing away a journeyman ſhoemaker, who is hired to make a ſingle pair of ſhoes, is ſuch an injury to his maſter as that an action will lie for it? Now the jury have found that there was no hiring for any determinate time, but only by the piece: If ſo, they could not be the plaintiff's ſervants; for the term 'journeyman' does not import that they belong to any particular maſter.

Lord *Mansfield* interrupted him. The queſtion is, Whether ſaying that ſuch a one is a man's journeyman, is as much as to ſay, that he is ſuch a man's ſervant; that is, whether the jury by finding him to be the plaintiff's journeyman do not *ex vi termini* find him to be his ſervant? A journeyman is a ſer-

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vant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finiſh the work he had undertaken, and the defendant knowingly enticed him to leave it unfiniſhed.

What is the giſt of the action? That the defendant has enticed a man away who ſtood in the relation of ſervant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the perſons enticed away were employed by the plaintiff as *his* journeymen. It might perhaps have been different if the men had taken work for every body, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own houſe and took in work for different people, it would be a ſtrong ground to ſay that he was not the journeyman of any particular maſter: But the giſt of the preſent action is, that they were attached to this particular maſter.

Aſton Juſtice. It is clear that a maſter may maintain an action againſt any one for taking and enticing away his ſervant upon the ground of the intereſt which he has in his ſervice and labour. And even ſuppoſing, as my Lord has ſtated, that the ſervant did live in his own houſe, if he were employed to finiſh a certain number of ſhoes for a particular perſon by a fixed time, and a third perſon enticed him away, I think an action would lie. If not, it might be of very bad conſequence in trade. He is a ſervant *quoad hoc*, and though the ſeducer and enticer is much the worſe, yet the law inflicts a penalty upon workmen leaving their work undone.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred. *Per Cur.* Let the poſtea be delivered to the plaintiff.

Tueſday, May 3d.

HOWLET and another *verſus* STRICKLAND.

In covenant, unliquidated damages ariſing from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of ſet-off

THIS was an action of covenant. The defendant pleaded that he had ſuſtained greater damages by reaſon of the breaches committed on the part of the plaintiff, than the value of the damages ſuſtained by the plaintiff on account of the breaches alleged in the declaration: all the breaches aſſigned in the plea were for non-delivery of allum in due time. The plaintiff demurred, and for ſpecial cauſe aſſigned, that it was not competent to the defendant to plead theſe damages by way of ſet-off.

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Mr. *Chambre* for the plaintiff. The covenant is not for money, therefore the damages cannot be ſet off, either by *ſtat.* 2 *G.* 2. *c.* 22. or 8 *G.* 2. *c.* 24. For they are not debts, nor recoverable as ſuch. A tender is only pleadable to an action of contract for money.

In no part of the plea is it alleged, that theſe are mutual debts. But farther in this caſe, the damages to be recovered upon the covenant, are totally uncertain; the meaſure of them depending upon the diſcretion of the jury. It is impoſſible therefore for the parties to affix any preciſe balance; and conſequently the act of parliament cannot extend to them. If the conſtruction which is contended for on the other ſide, is to prevail, damages upon a breach of marriage contract, might be inſiſted upon as debts: and the ſame reaſoning might extend to the ſetting off damages in an action of trover.

Mr. Serjeant *Walker* for the defendant. By ſtat. 2 *G.* 2. *c.* 22. a defendant is at liberty to ſet off any demand that he may have againſt the plaintiff; or to plead it in bar as the nature of the caſe may require, and by ſtat. 8 *G.* 2. *c.* 24. this power is extended to debts of a different nature.

The preſent action is an action for damages, and the ſet-off is of the ſame nature as the demand; *viz.* unliquidated damages: the verdict therefore will decide the balance. The uncertainty of the damages cannot be a foundation for the diſtinction inſiſted on: for the words of the ſtatute are general, "mutual debts:" and in almoſt all the caſes where a ſet-off is allowed, the balance is uncertain. In an action upon a *quantum meruit*, the very expreſſion ſhews, that the damages are unliquidated: ſo in an action for work or labour done, or for goods ſold and delivered, the damages are unliquidated. No inconvenience can ariſe in the preſent caſe, becauſe theſe damages ariſe upon the ſame inſtrument, and make but one tranſaction: the jury therefore can decide with equal eaſe upon both.

Lord *Mansfield*. I take this plea to be merely for the purpoſe of delay. The act of parliament, and the reaſon of the thing, relate to mutual debts only. Theſe damages are no debts. An *indebitatus aſſumpſit* could not be brought for them.

Mr. Juſtice *Aſhhurſt*. Debts to be ſet off muſt be ſuch as an *indebitatus aſſumpſit* will lie for.

Mr. Juſtice *Aſton*. Clearly an unliquidated demand or uncertain damages cannot be ſet off. Mr. Juſtice *Willes* concurred.

Judgment for the plaintiff.

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Thurſday, May 5th.

REX *verſus* SIR JOHN CARTER.

Information in the nature of a *quo warranto* granted, where the *right* depends upon a matter of *doubtful law*, in order to its being finally determined. The queſtion in this caſe, was, whether an *infant* of nine years old was capable of being elected a burgeſs?

UPON a rule to ſhew cauſe why an information, in the nature of a *quo warranto*, ſhould not be directed to the defendant, to ſhew by what authority he claimed to be a burgeſs of the borough of *Portſmouth*, the ground of the application was, that at the time of his being elected a burgeſs he was an *infant* of the age of nine years only; and therefore incapable of ſerving the office: and the caſe of *Rex* verſus *White*, *caſes temp.* Lord *Hardwicke* 8. was cited. But here it appeared that the defendant was not ſworn in nor ever acted till after he was of age.

Upon ſhewing cauſe, the counſel againſt the rule went very much at large into the doctrine of an infant's capacity to take. But as the court were clearly of opinion that they ought not to decide ſo material a queſtion in this ſummary mode, I ſhall poſtpone ſtating the arguments on this head, till the deciſion of this queſtion upon demurrer, *Mich.* 15 *Geo.* 3. *infra*, 220. when they were repeated.

Secondly, they preſſed the ground of long acquieſcence; ſtating that the defendant was elected a burgeſs in 1751, ſworn a burgeſs in 1763; an alderman in *September* 1763: afterwards elected mayor, and no objection made, till the preſent time, when the attempt is to diſfranchiſe *him*, and ſixty other perſons claiming under his election. As to eleven of them it was contended there could be no queſtion; becauſe the mayor, and all the aldermen who were within ſummons were preſent, and all concurred in their election. Amongſt them was Mr. *Barlow* the late mayor. If therefore the mayor choſen under *Carter* was not legal mayor, *Barlow*, agreeable to the terms of the charter, muſt be conſidered as legal mayor; becauſe the charter directs that the mayor muſt hold over until another be duly choſen.

Lord *Mansfield* ſtopped the counſel on the other ſide, as being unneceſſary to ſay any thing.—The only queſtion now before the court is, whether the rule ſhall be made abſolute, that is, whether the cauſe ſhall go to trial.

The only point which ſtruck me as material to be conſidered, was the ſecond ground of objection to the rule; namely, the circumſtances under which this application is made; from which

it

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it appears, that if the admiſſion and election had been at the ſame time, the defendant would have been in poſſeſſion above twenty years. But it is ſaid, though a title accrues within twenty years, the court, under circumſtances, will not interpoſe to diſturb the peace of the corporation. In caſes where there has been a long acquieſcence, and where the objection, if it prevailed, might go to diſſolve the corporation, the court might be ſo diſinclined. But here there is no acquieſcence for any conſiderable period of time; and it is admitted on all hands that it will not endanger the diſſolution of the corporation.

The objection then turns ſingly upon a point of doubtful law; whether an infant is capable of being elected a burgeſs. This may be a very conſiderable queſtion, and a great deal may be ſaid in favour of their being elected. An infant is capable of purchaſes and privileges that are for his benefit, and amongſt other privileges that of a grant. Suppoſe the king in the firſt charter had nominated an infant one of the burgeſſes: Upon a queſtion whether the nomination was void, it would depend upon circumſtances; and might turn upon the nature of the acts requiſite to be done by the burgeſſes. It may be a queſtion which in its conſequences may more or leſs affect the right of all the corporations in the kingdom. Therefore all theſe grounds operate concluſively to make the rule abſolute. The reaſons urged againſt it are, that there is no precedent which ſupports the application. But two caſes have been cited, in which the reaſon Lord *Hardwicke* aſſigns for ſending the very queſtion now under litigation to be tried, was, that it had never been ſettled. It does not appear that thoſe caſes ever were finally decided. Therefore the court in this caſe adopt the reaſon which weighed with Lord *Hardwicke*, and make the rule abſolute, that the queſtion may receive a full and final determination. As to the election of the eleven being good, upon the ground that if *Carter* was not mayor, *Barlow* was; where a man has no idea that he is acting in a particular capacity, it is the ſame thing as if he was abſent: no authority has been cited to ſhew that ſuch an election would be good; and we cannot in this ſummary way determine that it is. Therefore it is moſt clear that all the rules muſt be made abſolute.

The three other Judges concurred.

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Saturday, May 7th.

REX *verſus* ABRAHAM HALL.

The coſts to be paid by offenders under ſtat. 6 G. I. c. 48. ſect. 1. muſt be aſcertained by the conviction, or it is bad.

THE defendant upon a motion to diſcharge him out of priſon, being brought up by *habeas corpus*, and the warrant of commitment returned, it recited, that, "Whereas the defendant "was, upon the complaint of *Edward Ripley*, boatwright, and "upon the oath of, *&c.* convicted before me *John Drage* Eſq; "one of his majeſty's juſtices of the peace, *&c.* in purſuance of "an act of parliament paſſed in the ſixth year of the reign of "his preſent majeſty, for cutting down and carrying away one "aſh timber-tree, that was growing in a drove-way belonging "to an encloſed ground, called a dolver, at *Burwell* aforeſaid, "in the county aforeſaid, the property of *Matthew Deace* of "*Burwell* aforeſaid, gent. without the conſent of the ſaid "*Matthew Deace* the owner thereof. And this being for the "firſt offence, the ſaid *Abraham Hall* was ordered by me, the "ſaid juſtice, to forfeit and pay down the ſum of fifteen pounds, "*together with the charges previous to* and attending ſuch con-"viction: which he refuſed to pay. Theſe are, therefore, in his "majeſty's name, to require you the ſaid conſtable, to convey "and deliver into the cuſtody of the ſaid keeper of the ſaid com-"mon goal, the body of the ſaid *Abraham Hall*: and you, the "ſaid keeper, are hereby required to receive the ſaid *Abraham* "*Hall* into your cuſtody in the ſaid goal, and him there ſafely "to keep during the time of nine months, or until the ſaid for-"feiture or ſum of fifteen pounds, *together with the charges* "*previous to* and attending the ſaid conviction, ſhall be paid. "And hereof fail not."

Given under my hand and ſeal, *&c. John Drage.* And this is the cauſe of taking and detaining the ſaid *Abraham Hall*, *&c.*

Mr. *Bearcroft* objected to this commitment as illegal. For though the ſtatute is in the alternative "that upon non-payment "of the penalty and coſts, the offender ſhall be committed to "gaol for any time not exceeding twelve months, nor leſs than "ſix, *or* until the penalty and *charges* ſhall be paid, yet this "conviction does not *aſcertain* any ſum for coſts or *charges*: "the time of impriſonment therefore is uncertain, which is "fatal."

Lord

Lord *Mansfield*. This conviction cannot be supported. The principal judgment is a penalty in a certain sum of money, and imprisonment is a coercion of the payment: but while the sum remains uncertain the defendant cannot be released. Therefore, let the conviction be quashed, and the defendant discharged. The three other judges concurred. 1774.

LOVAT *versus* PARSONS and others, assignees of Allen. *Saturday, May 7th.*

IN *Trover* for a cask of indigo, upon a rule to shew cause why a new trial should not be granted; the facts, as they appeared upon the report of Mr. Justice *Ashhurst*, were as follows:

That one *Allen*, previous to his becoming insolvent, had ordered a small cask of indigo of the plaintiff; who, in consequence of such order, sent him a cask containing about 2 *cwt.* by the waggon. *Allen*, upon receiving notice from the plaintiff of the indigo being upon the road, sent a letter, complaining that the quantity was more than he could take. The answer to which was, that his order had been complied with, and that the plaintiff never sent less, and would expect to be paid for it within four months. *Allen* still objected to the quantity of the indigo, and also to the time of credit; but in a subsequent letter all objections were removed, by the offer of one *Smith* to take all the indigo of the plaintiff at a certain price, to which the plaintiff consented. Subsequent to this, and after the arrival of the indigo in the waggon, *Allen* made an assignment of all his effects for the benefit of his creditors, but refused to assign the indigo, saying it would injure the plaintiff. The question was, "Whether under these circumstances the indigo was the property "of *Allen* or of the plaintiff?" The jury found a verdict for the plaintiff, damages 111 *l.*

Serjeant *Davy*, in support of the rule, insisted, that the indigo having been sent to *Allen*, in pursuance of his order for that purpose, was become his actual property; and therefore, upon his insolvency, ought, as well as his other effects, to be equally divided amongst his creditors. For, though a seller who has delivered goods to a carrier by order of the vendee, may in case of an insolvency stop them *in transitu*, yet if they are delivered *to the vendee*, as in point of fact this indigo was, the property *is effectually* altered. If *Allen* had not become insolvent, he

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LOVAT *verſus* PARSONS.

would have been liable to the plaintiff in an action for goods ſold and delivered. If ſo, he is a debtor for them; and this being an aſſignment for the benefit of all his creditors, he would have no right to give a preference to the perſon ſelling the indigo; conſequently the vendor cannot claim ſuch preference.

Lord *Mansfield* inquired, whether the indigo, after arrival, remained in the hands of the carrier till the diſpute between the plaintiff and *Allen* was ſettled? Upon its being anſwered in the affirmative, and that the aſſignees, the day after the aſſignment, had prevailed on the carrier to deliver the goods to them; Lord *Mansfield* ſaid, I think it was a great indulgence in the judge to give you leave to move for a new trial without coſts. This is a diſpute about a parcel of indigo; and *Allen*, the perſon to whom it was originally ſent, refuſes to take it, becauſe the quantity is too great: he next objects to the ſhortneſs of the credit given; and finds fault both with the quality and the price. But at laſt he ſends word to the vendor, that he has met with a perſon who will purchaſe the indigo of the plaintiff in his ſtead, at a certain price; to which price the vendor in anſwer agrees. Subſequent to this, the defendants apply to *Allen* for an aſſignment of his effects for the benefit of all his creditors; and being appriſed of the diſpute relative to the indigo, requeſt him to aſſign that amongſt his other effects. This *Allen* poſitively refuſes to do, ſaying, he would ſooner rob on the highway, for that he had never accepted it. After this declaration, the aſſignees, with full notice that it was not *Allen*'s property, bribe the carrier to deliver the indigo to them, and now inſiſt they are entitled to it, as claiming under *Allen*, though he has renounced all claim or right to it whatſoever. I really never ſaw a caſe ſo void of pretence or law; and am extremely ſorry that leave was given to make the motion without coſts.—The three other judges concurred.—Rule diſcharged.

Monday, May 9th.

GRIFFIN *verſus* BLANDFORD.

Cuſtom ill ſet forth, for want of ſtating the particular *exceptions* to it.

IN Replevin, the defendant avowed the taking under an ancient cuſtom, that time out of mind, the Lord of the manor, upon the death and alienation of every tenant, was entitled to the ſecond beſt beaſt; if but one, then to that one beaſt; and if no beaſt, then to a compenſation in lieu thereof.

Upon

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Upon the evidence, the cuſtom appeared, by a decree of the Duchy of *Lancaſter*, to be, that time out of mind the Lord of the manor, upon the death of every tenant dying ſeized, and upon the alienation of all and every parcel of the ſaid lands, *&c.* had been uſed to have, and of right ought to have, the ſecond beſt beaſt, only one and no more; if but one beaſt, then that one; if no beaſt, then ſo much money as the chief rent amounted to; with an *exception* of meſne ſeignories, burgage tenures, and alienations to the uſe of the alienees and their heirs. Verdict for the plaintiff.

Upon a rule to ſhew cauſe, why a new trial ſhould not be granted, it was objected, that the cuſtom, as ſet forth in the conuſance, was different from the cuſtom proved; no exception being ſtated: and if there had, it might have appeared that this was a caſe within it.

Lord *Mansfield*. I am ſatisfied that, in point of form, the cuſtom is not ſet out as proved; for there is nothing in the plea, which goes to ſhew that burgage tenures and meſne ſeignories are excluded, therefore the objection muſt prevail. But there is nothing upon the merits.

Per Cur. Let there be a new trial, with liberty to the defendant to move to amend his plea.

BLATCH *verſus* ARCHER.

Same day.

In debt for an *eſcape* againſt the *ſheriff*, the indorſement of *non eſt inventus* upon the *ca. ſa.* is ſufficient evidence of its being delivered to the ſheriff.

UPON ſhewing cauſe, why a new trial ſhould not be granted, in this caſe, Mr. Juſtice *Willes* read his report as follows: ——"This was an action of debt againſt the ſheriff of "*Eſſex*, for an eſcape of one *Moody*. The declaration ſtated a "judgment of this court in debt, an arreſt, and a ſubſequent "eſcape. At the trial, a queſtion aroſe, whether the arreſt was "legal? It was objected, Firſt, that there was no proof of a "*ca. ſa.* being *delivered* to the ſheriff. But I held, the return "of *non eſt inventus* indorſed upon the writ ſufficient in this "action. Secondly, That the arreſt, if any, was by the ſon of "the bailiff, and not by the bailiff himſelf, who was at the "diſtance of thirty rods, and not *in ſight*, therefore *no legal* ar-"reſt. But I left it to the jury to ſay, whether old *Fenton*, "the officer, was not *quodam modo* preſent at the time of the ar-"reſt; the jury found that he was, and gave a verdict for the "plaintiff."—Upon the motion and now, a third ground of objection was made, namely, that no *warrant* was produced: but

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Serjeant *Kempe* and Mr. *Lucas* ſhewed cauſe. Firſt, The queſtion, whether old *Fenton* the officer was or was not preſent at the time of the arreſt, was a fact proper to be left to the jury. For it is nowhere laid down that the actual taking muſt be by the bailiff himſelf; it is ſufficient if it be by the aſſiſtant, and the bailiff be near at hand. In 6 *Mod.* 211. which is the only caſe upon the ſubject, there was no determination. Secondly, It is not neceſſary in an action againſt the ſheriff to prove that the *ca. ſa.* was delivered to him.

Mr. *Morgan* ſaid, his objection was that the *warrant* was not produced.

Anſwer. The warrant is in the hands of the officer, and therefore it is not in the power of the plaintiff to produce it: nor is it neceſſary in this action where the ſheriff is charged *civilly*. Otherwiſe, in an action of falſe impriſonment; for there a clear and regular authority muſt be ſhewn in every particular, or he is not chargeable; but here his own irregularity ought not to be an excuſe for his neglect. Beſides, the ſheriff's agent, one *Thomlinſon*, who was called and could have proved it, immediately, upon hearing his name, ran out of court to avoid his being examined.

Mr. *Wallace*, Mr. *Cox*, and Mr. *Morgan* in ſupport of the rule.

The fact to be proved in this caſe is, that the party was legally arreſted: To eſtabliſh which it muſt be ſhewn, either that the arreſt was by the ſheriff himſelf, or by virtue of a warrant in the hands of an officer, duly ſigned and ſealed by the ſheriff: for, an arreſt under a *verbal* authority would be illegal; and the party arreſted would be entitled to his diſcharge. It would be ſtrange in ſuch caſe to charge the ſheriff as for an eſcape under a *legal* arreſt. It was neceſſary therefore to ſhew that *Fenton* the officer had an authority; with regard to which there is no evidence; for the writ and the return only ſhew that the ſheriff had a writ: and it was in their power to have proved it; for they might have ſubpœnaed *Fenton*, and given him notice to produce the warrant. But ſecondly, ſuppoſe the warrant had been proved, this is no legal arreſt. For the warrant was given to the officer; and the arreſt was by his ſon, at the diſtance of thirty rods, which are two hundred yards, not even in ſight of the father, much leſs in his preſence which is neceſſary.

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Mr. *Morgan* objected ſtrongly that the warrant * was demanded by *Meody* the perſon arreſted, and not ſhewn; therefore the arreſt was bad; and cited 6 *Co.* 54. The counteſs of *Rutland's* caſe.

Lord *Mansfield.* This is rather a hard action; and certainly, in a caſe attended with hardſhip, juries have a leaning as far as juſtice will permit them, and ſo has the court. But ſtill I am not ſatisfied to ſay, that the verdict in this caſe is wrong.

An arreſt muſt be by the *authority* of the *bailiff*; but he need not be the hand that arreſts, nor in the preſence, nor actually in ſight, nor within any preciſe diſtance, of the perſon arreſted.

Several objections have been made; 1ſt. That the arreſt was not by the ſheriff's officer himſelf, for that the father was the officer, and the ſon the hand that arreſted. That the officer muſt be the *authority* to arreſt, is certain: but he need not be the hand that arreſts, nor in the preſence of the perſon arreſted, nor actually in ſight, nor is any exact diſtance preſcribed. As to the bailiff being the authority in this caſe, it is in proof that *old Fenton* came to *Ingateſtone* to arreſt *Moody*, and went out of the public houſe for *that purpoſe.* It is true one of the witneſſes ſpeaks to his being at the diſtance of thirty rods; but he does not ſpeak at the time of the arreſt; nor is it eaſy to ſpeak with certainty, as to diſtance at a particular time. But it is ſaid, that *young Fenton* the ſon, who could have cleared up the doubt, ought to have been ſubpœnaed by the plaintiff. It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one ſide to have produced, and in the power of the other to have contradicted. But I think it would have been very improper to have called the ſon; for in fact it is an action againſt his father the bailiff, though nominally againſt the ſheriff. Upon the whole therefore I am of opinion, that the fact was fairly and properly left to the jury; it was their province to judge, whether the officer was on *that buſineſs*; and if he was immediately following the ſon, it is ſufficient. It would have been a different caſe if he had been upon ſome other errand, or had ſtaid at home, and ſent a third perſon to make the arreſt.

As to the other objections, it is clear, that *old Fenton* was the officer who was to arreſt: and being ſo, his name, according to the uſual practice, is indorſed on the writ. *Laſtly*, the return of *non eſt inventus* on the back of the writ is ſufficient evidence againſt the ſheriff of the delivery of the *ca. ſa.* for it is an acknowledgment of it under his own hand. Therefore I am of opinion there is not ſufficient ground for granting a new trial.

* The evidence was, that young *Fenton* ſaid at the time of the arreſt, that he had his authority in his pocket, and that it was at the ſuit of Mr. *Blatch.* The name of old *Fenton* was indorſed upon the writ.

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Aſton Juſtice. It is not neceſſary that the bailiff ſhould be actually in ſight, but he muſt be ſo near, as to be near at hand, and acting in the arreſt; and the jury in this caſe have found that he was.

With reſpect to the delivery of the *ca. ſa.* it is evident it muſt have been delivered from the return of *non eſt inventus* indorſed upon the back of it. But it is further objected, that there ſhould have been a *mandate* to the officer, who was to take the body. Here *Fenton* was the perſon appointed; and his name appears upon the back of the writ, which it ſeems is the uſual ceremony of authorizing the bailiff to arreſt. But a material fact in this part of the caſe is, that the ſheriff's agent, one *Thomlinſon*, whoſe buſineſs it was to make out the warrants, and who could have proved the fact, upon being called, ran out of court to avoid being examined. Therefore I am of opinion, upon all the objections, that the rule ought to be diſcharged.

Aſhhurſt Juſtice. I am of the ſame opinion. The jury have found that the officer was ſo near as to be acting in the arreſt; which is ſufficient: he need not be actually in ſight. 2dly. It may be very difficult for a plaintiff to be able to prove the exiſtence of a *warrant*, which is in the cuſtody of the officer, and neceſſary to be ſo, as his own juſtification. Therefore very ſlight evidence is ſufficient to ſhew that there was a warrant, and here the bailiff's name is indorſed on the writ; which is the uſual method.

Per cur: Let the rule be diſcharged.

Tueſday, May 10th.

WHITBREAD *verſus* BROOKSBANK.

The price of barley at the *port* is the rule of the bounty upon the exportation

THIS was an action on the caſe, for money had and received by the defendant, an officer of the exciſe, to the uſe of the plaintiff. The jury found a ſpecial verdict in ſubſtance as follows:

of ſtrong beer, and not the *average* price of barley throughout the *kingdom*.

"That the plaintiff, after the 24th of *January* 1761, brewed from malted corn, and duly exported from the port of *London*, 6229 barrels of *beer* as merchandize at different times from the 6th of *June* 1771, to the 15th of *September* 1772, when barley was *at* and under the price of 24*s.* per quarter *at* the ſaid *port of London*, and *above* the ſaid price of 24*s.* per quarter, according to the *average price* of corn throughout the kingdom at large, as

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publiſhed in the Gazette, according to ſtat 10 *Geo.* 3. *c.* 39. for *regiſtring the prices of corn* in the ſeveral counties of *Great Britain*; upon which 6229 barrels of beer, the duties were charged and paid: and the ſaid plaintiff claimed to be allowed, by the commiſſioners of exciſe, and the ſaid *Stamp Brookſbank*, their proper officer in this behalf, the bounty of one ſhilling a barrel, amounting to 311*l.* 9*s.* 9*d.* by virtue of the ſtat. 1 *Geo.* 3. *c.* 7. *ſ.* 6. which directs ſuch bounty to be allowed on beer exported, when barley is at or under the price of 24*s.* per quarter, and which bounty, the ſaid commiſſioners and the ſaid *Stamp Brookſbank* had refuſed to allow: and that it was the *uſage* of the commiſſioners of exciſe to allow ſuch bounty on beer exported from the port of *London*, when the price of barley was 24*s.* per quarter, or under, at the port of *London*." The queſtion upon this ſpecial verdict was; "Whether the bounty was to be regulated according to the *average price* of barley throughout the kingdom, or according to the price at the port of *London*, from whence the beer was exported?"

Mr. *Davenport* for the plaintiff. The firſt act of parliament relative to the ſubject-matter in diſpute is 1 *W.* and *M.* *c.* 12. which gave a bounty on the exportation of corn. The act on which the preſent queſtion immediately ariſes, is 1 *Geo.* 3. *c.* 7. *ſect.* 6. which, reciting the ſtat. 1 *W.* and *M.* *c.* 12. and the bounty there given on corn, grants a bounty on the exportation of beer made from malted corn, as a further encouragement to agriculture. The ſtat. 13 *Geo.* 3. *c.* 43. which is the laſt act upon the ſubject, repeals all the former bounties, and grants others in lieu thereof, *to be paid and allowed* by the ſame rules and regulations as the former bounties were paid and allowed, *&c.* By compariſon of all theſe acts, it appears, that the rule of the bounty muſt be taken from the price of barley at the port or place of exportation. For though the ſtat. 1 *Geo.* 3. *c.* 7. is ſilent on that head, yet it certainly had a reference to the ſtat. 1 *W.* and *M.* *c.* 12. and it is found by the ſpecial verdict, that the uſage always has been to allow the bounty according to the price at the port of *London*. The queſtion then is, whether the *regiſter* act ſtat. 10 *Geo.* 3. *c.* 39. has made any alteration, or varied the rule in any reſpect? and it clearly has not, for it fixes no bounty, it regulates no price, it has no reference at all to the ſubject-matter. Further it appears from a compariſon of the two acts, that the regiſter act had

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quite a different object in view, namely, to enable the legiſlature to fix ſome permanent rule and price for the general exportation and importation of corn, &c. and this is the more apparent from the ſtatute made the next ſeſſions 11 *G.* 3. *c.* 1. to prohibit the exportation. Then followed the ſtat. 13 *Geo.* 3. *c.* 43. which, after reciting and taking into conſideration all the old rules, enacts, that whenever the different ſorts of grain, &c. there ſpecified ſhall bear ſuch a price *at* the *port* or place, &c. all duties upon importation are to ceaſe, and a leſs duty ſhall be paid; and when they bear ſuch a price the particular bounties upon exportation there mentioned are to commence; *which bounties are to be* paid and *allowed by the ſame rules and regulations as the former bounties on corn or grain, and in as* full and *ample a manner as if the clauſes* in ſuch former acts *were repeated.* From theſe ſeveral acts it appears, that as the prices of grain have varied in different parts of the kingdom, the rule which the legiſlature has purſued, in reſpect of the price, has been in ſome meaſure regulated by the relative ſcarcity of the commodity itſelf at each particular port. But as there has been no difference in the rule reſpecting the bounty from the 1ſt *W.* and *M.* *c.* 12. to the 1ſt *Geo.* 3. *c.* 7. and the ſtat. 13 *Geo.* 3. *c.* 43. certainly making none, the plaintiff in this caſe is clearly entitled to it.

Mr. Serjeant *Walker* for the defendant. The bounty muſt be taken from the national average price throughout the kingdom. Before the ſtat. 10 *Geo.* 3. *c.* 39. no doubt the rule of the bounty was according to the price of each reſpective place of exportation; but the legiſlature ſaw the inconvenience of regulating the bounty by the price at a particular port, when the general price throughout the kingdom might be different. And therefore provided by this act, that an average price ſhould be aſcertained: And wiſely; otherwiſe the moſt alarming conſequences might enſue. The nation at large might be in want of corn, when, at a particular port, the price either by deſign or accident had been raiſed; and the general ſcarcity would be increaſed at the additional expence of a bounty to the very perſon increaſing it, namely, the exporter. The medium price of all the markets in *England* ought to be the price, and is the right one.

Lord *Mansfield.* My principal doubt is, how this came to be made a queſtion; becauſe I do not ſee the ground upon which the exciſe have varied the former uſage. The act of *W.* and *M.* refers to the price at the port, and the uſage under it has been uniformly ſo. Then follows the ſtat. 1 *Geo.* 3. *c.* 7. which gives a bounty

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bounty upon the exportation of beer, to be governed by the price of barley; and the jury find, that the rule, by which the exciſe has governed itſelf in the allowance of this bounty, has been, by the price of barley at the *port* This rule has continued to the 10 *Geo.* 3. *c.* 39. which was made for quite a different purpoſe, whether politically or not is a great doubt: but the view was to guide the judgment of the legiſlature in aſcertaining the quantity of corn and grain, exported and imported, in order to fix a rule by which the price of corn might be known in all parts, and conſequently to render it capable of having an average price fixed: but it does not refer or apply to any of the former acts, or make mention of them. *Laſtly*, the ſtat. 13 *Geo.* 3. *c.* 43. was enacted, which regulates the bounty according to the price at the port, but does not ſay a word about an average price. What then is the ground on which a new conſtruction is to be made? I profeſs I cannot ſee: it was very eaſy for parliament to have ſaid, if they had thought fit, or had judged it wiſe ſo to do, that the bounty ſhould be regulated according to the average price of corn, *&c.* I really can ſee no ground upon which the commiſſioners of exciſe proceed.

An action for *money had and received* does not lie againſt a *revenue officer* to recover an *over-payment.*

The court upon the argument had obſerved, that the verdict could not ſtand, becauſe an action for money had and received will not lie againſt an exciſe officer for an over-payment, and that the word "*ſtrong*" beer ought to have been inſerted: for the ſtat. 1 *Geo.* 3. relates to "*ſtrong*" beer only. But theſe objections were very candidly waived by Mr. Serjeant *Walker*. Lord *Mansfield* now ordered it to be ſtated, that the defendant by conſent waived the irregularity in the finding, and the omiſſion of the word "*ſtrong*" beer; for his Lordſhip added, it might be of great inconvenience, if this caſe ſhould hereafter be made a precedent, that an action for money had and received, will lie againſt an officer of revenue for an over-payment.

The reſt of the judges concurred.

Poſtea delivered to the plaintiff.

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Same day.

BUTLER *verſus* COOKE.

An uncertificated bankrupt may be a witneſs to decreaſe but not to increaſe the fund.

THIS was an action on the caſe for goods ſold and delivered. *Non aſſumpſit*, and verdict for the plaintiff.

Upon ſhewing cauſe why a new trial ſhould not be granted, the queſtion was, Whether one *Baker* who had been twice a bankrupt, but had not obtained his certificate, could be admitted as an evidence to prove that the goods in queſtion were delivered to the defendant on the credit and for the uſe of him the bankrupt, and not on the defendant's own account. At the trial he was rejected as being an intereſted witneſs.

Mr. *Cox* and Mr. *Innys* againſt the new trial objected, that *Cooke* being a creditor to a very conſiderable amount, the bankrupt was intereſted in leſſening his debt as an inducement to *Cooke* to ſign his certificate, and therefore his evidence was clearly inadmiſſible.

Mr. *Lucas* in ſupport of the rule. This is a ſecond commiſſion, under which the inclination of the creditors to ſign or not to ſign the certificate is of no avail: for by ſtat. 5 *Geo.* 3. *c.* 30. no man can obtain his certificate under a ſecond commiſſion, unleſs he pays 15 *s.* in the pound.

Mr. *Buller*, on the ſame ſide, cited the caſe of *Langden* and others aſſignees of *Walker* verſus *Walker*, *Mich.* 13 *Geo.* 3. *B. R.* as in point. "That was an action for money due to the bankrupt "from the defendant, and was tried at the ſittings after *Trinity* "term 13 *Geo.* 3. before Lord *Mansfield*; upon the bankrupt "being called as a witneſs on the part of the defendant, an "objection was taken to his competency, becauſe he had not "obtained his certificate. But Lord *Mansfield* over-ruled the "objection. Afterwards, on a rule to ſhew cauſe why a new "trial ſhould not be granted, upon the ground of his being an "incompetent witneſs, *per* Lord *Mansfield* and the court, it is "a ſettled rule, that a bankrupt may be a witneſs to *diminiſh* the "fund, though he has not obtained his certificate; becauſe, in "ſo doing, he ſpeaks moſt manifeſtly againſt himſelf: for he "may not only defeat his title to the benefit which the law "allows him if the fund is of a certain amount, but he ha-

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" zards the diſpleaſure of all his other creditors. But he is not " a good witneſs, for the purpoſe of enlarging the fund, unleſs " he gives a releaſe and has got his certificate." 1774. BUTLER *verſus* COOKE.

Lord Mansfield. This is a very clear caſe. The circumſtance of this being a ſecond inſolvency, makes no difference with reſpect to the principle. A bankrupt who has not obtained his certificate, may be a witneſs againſt himſelf, but not for himſelf; that is, he may be a witneſs to decreaſe the fund, but not to increaſe it: And in this caſe, his evidence clearly goes to decreaſe it. Therefore he is a competent witneſs. The conſequence is, that the rule for a new trial muſt be made abſolute.

The three other judges concurred.

ORTON *et al.*, aſſignees, *verſus* VINCENT *et al.*, bail of BEDFORD. *Wedneſday, May* 11th.

MR. *Buller* had moved to ſtay the proceedings in this caſe upon the aſſignment of the bail-bond, upon payment of coſts and the ſum ſworn to; the defendant in the original action being dead. Mr. *Mansfield*, who ſhewed cauſe, ſaid, this was not the practice where the bail-bond is aſſigned, though it might be allowable upon putting in bail above: but after aſſignment, the bail can only redeem themſelves by payment of the debt and coſts. It was ſo ſettled in *Savage* v. *Weſt*, 9 *Geo.* 3. Mr. *Wallace* there ſhewed cauſe, why, upon payment of eleven guineas (the ſum ſworn to) and coſts, all proceedings on the bail-bond ſhould not be ſtaid; and why an *exoneretur* ſhould not be entered on the bail-piece. The court diſcharged the rule, and held, that the plaintiff in the action was entitled to recover not only the ſum ſworn to, with coſts, but the whole debt due. Where the plaintiff might have had judgment againſt the original defendant, the bail below are liable for the whole debt and coſts.

Mr. *Buller* in ſupport of the rule. The diſtinction is, where the plaintiff could not have had judgment in the original action: there, it is clear, that the proceedings may be ſtaid upon payment of *coſts only*. 1 *Barnes* 48. 63. 2 *Barnes* 79. Thoſe caſes are in conformity to the general rule of the court, never to make a bail-bond ſtand as a ſecurity, where the plaintiff can be put in as good a condition as if he had never been delayed. Here, the declaration was delivered on the 8th of *February* laſt, and the defendant died in the vacation. Therefore, as the plaintiff could not have had a verdict, nor, of courſe, judgment under the ſtat. 17 *Car.* 2. *c.* 8. he could have reaped no benefit from the ſuit. He

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hoped therefore the court would, under theſe circumſtances, ſtay the proceedings upon payment of coſts only; without the addition of the ſum ſworn to, as prayed by the rule.

But it appeared, by Mr. *Mansfield*'s affidavit, that the plaintiff might have proceeded to trial in the original action, at the ſittings after laſt *Hilary* term; and as the defendant did not die till after that time, the plaintiff might of courſe have entered up judgment in the beginning of this term, under the ſtat. 17 *Car.* 2. *c.* 8.

Per Curiam. The practice is ſettled, that where the plaintiff might have had judgment againſt the original defendant, the bail below are liable for the whole debt and coſts: and in this caſe it is clear he might have had judgment againſt the original defendant. Therefore let the rule be diſcharged.

Same day.

GRIBBLE *verſus* ABBOT.

MR. *Cowper* had moved to ſtay the proceedings in an action upon the judgment, pending a writ of error. Mr. *Buller* on ſhewing cauſe, produced an affidavit, in which it was ſworn, that the defendant himſelf had acknowledged that the writ of error, which had been depending two years, was merely for delay.

The court ordered, that upon the defendant's confeſſing judgment in this action, and undertaking to bring no writ of error thereupon, execution ſhould be ſtaid till the determination of the writ of error depending. Mr. Juſtice *Aſton* ſaid, the court had made a like rule a few terms ago.—It was then objected, that the defendant might ſtill bring his bill in equity. But the court ſaid, they could not make him undertake to waive his right in that reſpect.

Friday, May 13th.

BLANDFORD *et al.* executors, *verſus* FOOT.

A defendant who has been ſuperſeded, for want of being charged in execution within two terms after judgment, cannot be held to *ſpecial bail* in an action brought upon ſuch *former* judgment: but he may be charged in *execution*, after *judgment* obtained in the *ſecond* action.

THIS was a rule to ſhew cauſe why the writ of *capias ad ſatisfaciendum*, iſſued in this cauſe, ſhould not be ſet aſide for irregularity, and why the defendant ſhould not be diſcharged out of the cuſtody of the ſheriff of *Middleſex* as to this action.—The defendant had been ſuperſeded for want of being charged in execution within two terms after judgment. Eight years after, the executors of the original plaintiff brought an

action

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action of debt on the former judgment; and having obtained judgment in this ſecond action, cauſed the defendant to be taken on the *ca. ſa.* mentioned in the rule; whereupon Mr. *Baldwin* moved as above.

And now, on the part of the defendant, he inſiſted upon it as an univerſal rule, that where a defendant has been once diſcharged out of cuſtody, at the ſuit of a plaintiff, he can never be taken in cuſtody again at the ſuit of the ſame plaintiff.

Mr. *Buller contrà.* The rule does not extend ſo far as Mr. *Baldwin* has laid it down; it goes no further than that the defendant ſhall not be held to *bail* in the ſecond action. But he may be taken in *execution* after judgment obtained in ſuch ſecond action: becauſe the debt is not the ſame as that for which the original action was brought, but is increaſed by the coſts, and in the preſent caſe by intereſt. He cited *Poulter* v. *Salmon*, *Hil.* 13 *Geo.* 2. *Barnes* 383. where the defendant having been ſuperſeded after judgment for want of being charged in execution, and being taken in execution upon a judgment obtained in an action on the firſt judgment, applied to be diſcharged. The *C. B.* took time to conſider of it. The next term the defendant obtained a rule to be carried to the next aſſizes, to be diſcharged on the Lords' act: But this laſt rule was diſcharged by the court, and nothing further was done on the preceding rule. Therefore he inſiſted, it was a ſufficient authority to ſhew that a defendant may be taken in execution in a ſecond action.

Mr. Juſtice *Aſton.* (Lord *Manſfield* abſent.) A defendant cannot be taken in cuſtody again upon the *ſame* judgment after being ſuperſeded; nor can he be held to bail in a ſecond action; but in a new action, I incline to think he may be charged in execution. In *Bonnevell* verſus *Owlett*, *Mich.* 19 *Geo.* 2. *R. B. Wright* Juſtice thought he could not, but *Deniſon* Juſtice doubted whether the court could prevent it; becauſe the ſecond judgment was for coſts alſo. That caſe was adjourned.

Curia adviſare vult.

The next day, Mr. Juſtice *Aſton*, (Lord *Manſfield* abſent,) delivered the opinion of himſelf and the other two puiſne judges.

We have looked into the authorities, and are of opinion that in this caſe the rule muſt be diſcharged. In the caſe of Wright adminiſtrator verſus Kerſwill, Barnes 376. *Mich.* 10 *Geo.* 2. *C. B.*

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C. B. a diſtinction was taken between a *ſuperſedeas* upon *meſne* proceſs, and a *ſuperſedeas* after *judgment* obtained: in which caſe it was decided, "that as the defendant had there been diſcharged by *ſuperſedeas* before judgment, he was not finally "diſcharged, and therefore liable after judgment to be taken in "execution; though where a defendant is ſuperſeded after judg-"ment, for want of being taken in execution within two terms "after judgment obtained, his perſon cannot afterwards be taken "in execution." Here that caſe ſtopped: but the proceedings were all in the *ſame* action, not in a *new* one, upon a former judgment. Then in the caſe of *Poulter* verſus *Salmon: Hil.* 13 *Geo.* 2. *C. B. Barnes* 383. which was preciſely the ſame as this caſe, there was no deciſion; becauſe a ſubſequent application was made by the defendant, pending the conſideration of the court upon the *ſuperſedeas*, to bring him up to the next aſſizes to be diſcharged upon the Lords' act; and he had a rule accordingly; but this laſt rule was afterwards diſcharged, as being inconſiſtent with the application for a *ſuperſedeas*. Upon looking into the rule of *C. B. Hil.* 8 *Geo.* 2. we think its ſole object was to prevent the defendant from being held to *bail* in a new action: for it provides only, that if after a *ſuperſedeas* an action of debt be brought upon the judgment, a *common appearance* ſhall be accepted for the defendant in ſuch action: but it is totally ſilent as to execution, or the proceedings thereupon. In the caſe of *Bonnevell* verſus *Owlett*, *Mich.* 19 *Geo.* 2. *B. R.* which I thought had received no deciſion, I find, by the aſſiſtance of Sir *James Burrow*, who was ſo diligent as to remain in court till 9 o'clock at night on the laſt day of the term, that it was decided, and the rule diſcharged. His note is as follows: *November* 7th, *Mich.* 19 *Geo.* 2. The defendant, who in a former action againſt him had not been charged in execution in due time, had a new action brought againſt him on the former judgment for debt and coſts. Upon a rule to ſhew cauſe why he ſhould not be diſcharged, the queſtion was, Whether his perſon could be now taken in execution upon this ſecond action?—*Lee* Chief Juſtice, *Deniſon* and *Foſter* thought the court could not deprive the plaintiff of the benefit which the law entitled him to. But *Wright* thought this would be an effectual method for the plaintiff to evade the benefit intended for defendants (who were inſolvent) by the Lords' act. *Adjornatur.* Before I proceed to the ſubſequent determination of this caſe, I muſt obſerve, that as to evading the Lords' act, in 2 *Str.* 943.

Maud

Maud verſus *Braithwaite*, the court would not allow of ſuch evaſion. In that caſe, the defendant being in cuſtody, the plaintiff obtained judgment; and inſtead of charging the defendant in cuſtody (whereby he would be entitled to his diſcharge on the Lords' act) the plaintiff brought an action of debt upon the judgment, and charged him in cuſtody. But on application to the court, when he had lain two terms after the judgment, the court diſcharged him on common bail: ſaying, "it was a "trick to deprive the defendant of the benefit of a merciful "law." So that the party ſhall not deprive a defendant from receiving this benefit by a trick.—To return to the caſe of *Bonnevell* verſus *Owlett*, thus much having paſſed as before ſtated on the 7th of *November*; afterwards, on the laſt day of the term, Sir *John Strange* of counſel for the defendant owned, that the defendant had never been charged in *execution* upon the *firſt* judgment, though he had lain long enough to have been charged if the plaintiff had thought fit to have done ſo. Whereupon the court were clearly of opinion that he might now be taken in execution, *having never been charged in execution before*; and accordingly diſcharged the rule.

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This caſe is preciſely in point; and to be ſure the reaſon of the thing is exceedingly ſtrong; namely, that the defendant *never* has been charged in *execution*. The benefit of common bail may be reaſonable before judgment; but that is no reaſon why after judgment he ſhould not be charged in execution. Therefore upon the authority of *Bonnevell* verſus *Owlett*, and the reaſon of the thing, my brethren and I are of opinion, that the rule ſhould be diſcharged.

REX *verſus* BINSTED and others, burgeſſes of Portſmouth.

Saturday, May 14th.

UPON ſhewing cauſe why an information in the nature of a *Quo warranto*, ſhould not be granted againſt the defendants, to ſhew, by what authority they claimed to be burgeſſes of the borough of *Portſmouth*; the Objections were: *Firſt*, That there was not a ſufficient majority to elect. *Secondly*, No ſummons. *Thirdly*, The day on which they were elected was a day appointed by the charter itſelf for other buſineſs, and *not for election*.

The diſcretion of the court, in granting an information in the nature of a *Quo warranto* within twenty years, is to be guided by circumſtances.

Exception

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REX *verſus* BIRSTED.

Exception was taken by Mr. *Buller*, who ſhewed cauſe, that the Town clerk, upon whoſe affidavit alone the information had been prayed, was as fully appriſed of all the objections ſtated in the affidavit, at the election of the defendants ſeven years before as at the time of the preſent application: and therefore, being the only proſecutor, the information ought not to be granted at his inſtance: and cited the caſe of *Rex* v. *Radnor*, 1 *Bur.* 781.

To this it was anſwered by Mr. *Bearcroft* and Serjeant *Glynn* in ſupport of the rule, that there is no general rule for the court to refuſe an information, becauſe the proſecutor was preſent at the proceeding complained of, and did not immediately apply. That in this caſe the Town clerk was not the proſecutor, but a witneſs only, from his office capable of giving the beſt evidence relative to the right mode of election: but at the ſame time merely miniſterial; without power to adviſe or remonſtrate againſt any illegality in the proceedings of the corporation. He only informs the court of the fact, and ſwears to the cuſtom.

Lord *Mansfield*. The court has very rightly eſtabliſhed it as a general rule, that after twenty years undiſturbed and peaceable poſſeſſion, they will not grant an information under the diſcretionary power given them, by the ſtat. 9 *Ann. c.* 20. This rule does not interfere with the right of the crown to proſecute by the Attorney General, who may file his information *ex officio*: but it was adopted by the court upon principles of public convenience, and by analogy to many other caſes. The limitation has by ſome gentlemen been thought *too long*: and ſeveral applications have been made to parliament to narrow it; but the legiſlature hitherto has not thought proper to interfere. The occaſion which gave riſe to it was the proſecution againſt the borough of *Winchelſea*, * *Mich.* 7 *Geo.* 3. in which the court was ſo ſtruck with the attempt to impeach a poſſeſſion of thirty years, that they thought it neceſſary to fix ſome certain point of limitation, beyond which they would not go back to diſturb a franchiſe ſo long acquieſced in; and accordingly the rule above was eſtabliſhed. But the court declared at the ſame time, that though *twenty* years poſſeſſion ſhould be a bar without any other circumſtances, yet they did not mean to be underſtood, that under *circumſtances* they would not refuſe an information even *within* that period: and accordingly in one * of the *Winchelſea* cauſes, a ſolemn judgment was given againſt the application under the particular circumſtances of that caſe. But *no* rule has been laid down as *deciſive* reſpecting an information *within* that time

2 *Bur* 1962.

4 *Bur.* 2022. 2121.

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REX *verſus* BINSTED.

time: but it depends upon a variety of circumſtances. If the party applying has been guilty of any iniquitous practice, the court will not admit his complaint as a ſufficient ground for granting an information. And in *Rex* v. *Lewis*, 1 *Bur.* 780. there was improper behaviour in the perſon applying. So, if the defence depends upon a matter of fact, which may be loſt or made difficult of proof by length of time, though within twenty years; and the party applying lies by, till this evidence of defence may be loſt, as in the caſe of reſidence. Another ſet of circumſtances weigh very much; namely, where many derivative rights, and many corporate acts may be overhaled ſo as to endanger the diſſolution of the corporation.

Let us then conſider the circumſtances of the preſent caſe. It appears here that ſome champion on the other ſide has firſt thrown the gauntlet, and diſturbed the peace of the corporation; and that all would have been quiet if the other ſide had not been the aggreſſors. This is a ſort of defence rather than an attack. There is no lying in wait by the perſon on whoſe affidavit the information is prayed; no difficulty of proof with reſpect to any matter of fact. On the contrary one of the matters in queſtion is a general cuſtom which can be eaſily proved the one way or the other. The poſſeſſion is but a poſſeſſion of ſeven years, from which no great diſtreſs is likely to ariſe, and with reſpect to the conduct of the perſon upon whoſe affidavit the application is founded, the office of town-clerk, which he holds, does not oblige him to be acquainted with the regularity of the proceedings, or to impeach for want of it. But the material circumſtance is, that he is not the proſecutor, but a witneſs only; and it is not ſo much an attack as a defence.

The other judges concurred.

Rules made abſolute, fourteen in all.

THE END OF EASTER TERM.

TRINITY TERM

14 GEORGE III. B. R. 1774.

Monday, June 6th.

REX *verſus* Inhabitants of BODENHAM.

A Certiorari pro rege lies on ſtat. 13. *Geo.* 3. *c.* 78. *ſect.* 24. relative to highways before traverſe of the indictment or judgment thereupon.

THIS was an indictment upon the ſtat. 13 *Geo.* 3. *c.* 78. for a nuiſance in the highway. The proſecutor had taken out a *Certiorari* which the defendants had moved to ſuperſede, and now upon ſhewing cauſe why a *procedendo* ſhould not iſſue, Mr. *Wallace* inſiſted, that ſect. 24 of the ſtat. which provides, "that "no indictment or preſentment ſhall be removed by *Certiorari* "till ſuch indictment be traverſed, and judgment thereupon "given," does not extend to the crown, but only to a *Certiorari* at the inſtance of a defendant. That the above clauſe is copied from the very ſame clauſe in the ſtat. 22 *Car.* 2. *c.* 12. *ſect.* 4. and cited the caſe of *Rex* verſus *Farewell*, 2 *Str.* 1209. where the court held, that the clauſe, in the laſt mentioned ſtatute, related only to a *Certiorari* moved for at the inſtance of defendants and not to a *Certiorari pro Rege.*

Mr. *Bearcroft contrà* for the defendants admitted, that the King has a right to try his own cauſe in whatever court he pleaſes: but here a private perſon is the real proſecutor, and therefore not entitled to the ſame privilege.

But *per cur:* In caſes of this ſort there is no diſtinction; and the words "till ſuch indictment be traverſed, *&c.*" ſhew very plainly that this clauſe was not intended to take away a *Certiorari* at the inſtance of the crown: for the King does not traverſe. It was calculated only to prevent defendants bringing a *Certiorari* for delay. Therefore let the rule be made abſolute.

1774.

Same day.

REX *verſus* GARDNER.

A corporation ſeiſed of lands in fee for their own profit, are within the meaning of ſtat. 43 *Eliz. c.* 2. inhabitants or occupiers of ſuch lands, and, in reſpect thereof, liable in their *corporate capacity* to be rated to the poor.

THIS was a rule to ſhew cauſe, why an order of ſeſſions made for amending a rate or aſſeſſment made for the relief of the poor of the pariſh of *St. Botolph* in the town of *Cambridge* ſhould not be quaſhed for the inſufficiency thereof.

The ſubſtance of the caſe ſtated was as follows: That *Philip Gardner*, burſar of *Catharine Hall, Cambridge*, appealed from a poor rate, whereby he was charged the ſum of 2*l.* 15*s.* for 55*l.* *per annum*. That about the years 1754 and 1755, the maſter and fellows of the ſaid college purchaſed five houſes in the pariſh of *St. Botolph* of the annual rent of 55*l.*; and being ſo ſeiſed thereof, pulled them down and converted the ground upon which they formerly ſtood, in the firſt place, towards erecting twelve apartments for the reception of ſix fellows and ſix ſcholars, upon the foundation of Mr. *Ramſden*: that this building adjoined the old college; but had never been inhabited: that another part was taken into the maſter's garden: that about 140 feet in length of the college walls, together with the gates, ſtood upon another part which was taken into the college court, and incloſed by the walls: a part, between the college walls on the outſide and the ſtreet, was appropriated towards making an area, and planted with trees for ornament: And on the reſidue were erected two houſes adjoining to each other, one inhabited by the college butler and his family, the other by the college porter, both without the college; the former having no communication with it, but through the latter there was an entrance for the ſociety to come into the college after the gates were ſhut. That both the butler and the porter had the entire uſe of their reſpective houſes without the college intermeddling therewith, and took in lodgers and boarders. That after the houſes were pulled down, the rates and taxes of the pariſh ceaſed, and from 1761 to 1769 no rates or taxes were paid by the maſter and fellows; that the pariſh then aſſeſſed the college to the land-tax at the rate of 55*l.* a-year rent for the premiſes. That the maſter, *&c.* paid the ſame from that time; that at the ſame time the pariſh rated them for the premiſes to the poor rate for 55*l.* in the ſame manner as in the rate is ſet forth. That the ſaid *Gardner* now

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REX *verſus* GARDNER.

now is, and at the time of making the rates was, burſar of the ſaid college. This court therefore is of opinion, that the ſaid rate or aſſeſſment as to all perſons named therein (except the ſaid *Philip Gardner* for the maſter and fellows) ſhould be confirmed, and as to the aſſeſſment on *Gardner* that the ſame ſhould be *amended* by ſtriking out the ſaid charge on him, and rating the *maſter* and *fellows* for the ſaid premiſes, except ſuch part as is taken in for the new buildings for ſix fellows, and ſix ſcholars in the proportion following.

	£.	s.
The reverend Dr. *Prefcot* maſter of the ſaid college for part of his garden, - -	1	0
The maſter and fellows for the houſe erected for the butler, - - - -	4	0
Ditto for ditto for the porter, - -	3	0
Ditto for ditto for the reſt of the premiſes added to the college court, and for part of an area to the college, - - -	43	15

Mr. *Mansfield* ſhewed cauſe. The queſtion is, Whether the maſter and fellows of *Catharine Hall* are liable to be rated to the poor for this area, which formerly had houſes built upon it? Two objections are made, *Firſt*, that by law no corporate body is rateable to the poor. This objection is founded upon what fell from Mr. Juſtice *Yates* in the caſe of *Rex* verſus Inhabitants of *St. Bartholomew* the *Leſs*, *Trinity* term 9 *Geo.* 3. *B. R.* But ſuch opinion is not ſupported by any caſe or reaſon; on the contrary, it has been decided, that corporations, having lands, may be rated, and have been conſidered as *inhabitants* in reſpect of ſuch lands. 2 *Inſt.* 703. Lord *Coke* in his expoſition of the ſtat. 22 *Hen.* 8. *c.* 5. for the repair of bridges, commenting upon the word *inhabitants*, with reſpect to what perſons are included under that deſcription, ſays, "every "*corporation* and body politic having lands, *&c. quæ propriis manibus poſſident et habent*, are *inhabitants* within the purview of this ſtatute. If they are inhabitants as to the repair of bridges within the purview of the ſtat. 22 *Hen.* 8. they are equally ſo as to rates made under the ſtat. 43 *Eliz.* for the relief of the poor. In *Thurſfield* verſus *Jones*, Sir *Thomas Jones*, 187. the court held, that the maſter and wardens of the company of wax-chandlers were chargeable to the repairs of the church in reſpect of their *corporate* lands. It is clear from theſe two caſes, that

corporations having lands in their occupation, may be charged to the repair of bridges, and to church rates. 1774.

With reſpect to the opinion of Mr. Juſtice *Yates* in *Rex* verſus *St. Bartholomew* the *Leſs*, the court did not determine that caſe upon the ground of the governors, &c. not being rateable as a corporation; but becauſe there was no perſon belonging to the hoſpital, who could properly be called an inhabitant or occupier. Here the maſter and fellows occupy the area in queſtion, and have the benefit of it; and the remedy of diſtreſs is open if they refuſe payment. Rex verſus Gardnar.

The *ſecond* ground of objection is, that theſe areas are in ſuch a ſtate as to yield no profit. But in point of fact they do yield profit; for they render the ſituation more healthy, and therefore in more requeſt. But the yielding or not yielding profit is not the conſideration that renders them rateable, but the circumſtance of occupation.—He admitted that the rate upon the butler's houſe, and upon the porter's lodge, ought to have been made upon them perſonally, and not upon the college.

Mr. *Dunning* and Mr. *Pemberton contra*.

Corporations are not rateable, becauſe the remedy of impriſonment, upon failure of diſtreſs, is impoſſible; and the remedy of diſtreſs alone inadequate. As to church rates, they differ from the preſent caſe, for we are now upon the poſitive words of an act of parliament; and according to *Skin.* 27. in the caſe of *Thurſfield* verſus *Jones*, the queſtion, whether a corporate body was rateable to the church rate or not, was not before the court. Corporations were not in the contemplation of the legiſlature under the ſtat. 43 *Eliz. c.* 2. The word *inhabitants*, in that ſtatute, means inhabitants that can be *committed* upon failure of a *diſtreſs*. It is not material what other deſcription of inhabitants may be found in Lord *Coke* or elſewhere: they do not apply to this caſe. The word inhabitants, in this act of parliament, was only introduced to make perſonal property liable which did not lie in occupation. It is true, poſitive proviſions may make corporations liable: and perhaps without ſuch poſitive proviſion, ſome corporations may *ſub ſilentio* have ſubmitted to be rated to the poor. But neither of theſe apply to the preſent caſe.

The caſe of *St. Luke's* hoſpital ſhews, that nothing can be rated which does not yield a profit. The advantages gained by this area are juſt like thoſe which were gained to *St. Bartholomew's* hoſpital by their area. But with regard to the profit

1774. accruing from it, the subject-matter excludes the possibility of rating it: for nothing is more apparent than that where property is the subject of a rate, the value of it must be certain, because the measure of the profit is the measure of the rate. But here nothing is or can be received, and therefore there can be nothing to pay.

REX versus GARDNER.

Lord *Mansfield* asked if any inquiry had been made into the fact of corporate bodies being rated, such as the *South-sea* house, *India* house, &c. Mr. *Mansfield* mentioned the *Barbers' Company* being rated for their hall. Mr. *Wheeler*, the corporation of *Coventry*: and Mr. *Lucas* added that many of the *Companies* of the city of *London* were rated, and the only question had been whether over-rated or not.

Lord *Mansfield*.

This is a question of a great deal of consequence.—And the usage under the statute 43 *Eliz. c.* 2. is very material: for great care must be taken to get at certainty in determinations, and to avoid overturning settled practice. It was that consideration which made me ask how the fact was, with regard to corporations. For if corporations have been usually rated all over the kingdom for above a century, there will be little inconvenience in adopting that usage. If on the contrary they have not, it will be a strong argument in support of the objection, that they are not rateable.

In the case of *St. Luke's** hospital, I recollect that I put it upon this question; "Was there any body there who could be "rated as *occupier?*" In that case the difficulty arose from a matter of substance, not form: for they could find nobody to rate. There were three sorts of persons only who could be charged as occupiers: 1st. The servants of the hospital: 2dly. The poor madmen who were the objects of the charity: and 3dly. The Trustees. With regard to the first, a clear distinction was taken between them and the officers of other charitable foundations, such as *Chelsea* hospital, who have been held rateable, not as servants of those charities, nor as inhabitants of the ordinary lodgings; but as having separate apartments, which were considered in the light of dwelling-houses. 2. As to the poor madmen there could be no doubt of their not being rateable. 3. The next were the trustees; but it being stated in the case that they were *mere* nominal trustees for the poor objects of the charity, they were held upon that ground not to be rateable. Upon looking

* 2 *Burr.* 1064.

looking into the note of that case, I find I observed, that if there were a fourth description of persons who might properly be charged as occupiers, they would not be included in or affected by the judgment which the court was about to give. 1774. REX versus GARDNER.

Then came the case of *St. Bartholomew* *, and the grounds upon which that case was determined coincide exactly with the reasoning in the case of *St. Luke*. In the case of *St. Bartholomew* it was stated, that *Henry* the 8th in the 38th year of his reign granted all the said hospital to the corporation of *London*, and directed that it should be for the use of the poor. That after the fire of *London*, several houses were made in the hospital for the benefit of the citizens of *London*, who were then first charged to the poor rates, as occupiers of those houses. That in the year 1730, some of the ancient buildings together with some of these houses were pulled down: that since that time four large piles of building had been erected, amongst the rest one containing a hall for the governors to meet in, *&c.* That in 1758 the officers of the hospital were first rated to the poor, owing to the opinion given in the case of *Chelsea* hospital. In 1766, the quadrangle of the hospital being completed, the governors pulled down eighteen houses to make an area for the benefit of the patients; for which area the governors were rated. And the question was, "Whether the governors were or were not "rateable for this quadrangle and area?" From these facts it appeared that in its origin it was for the benefit of the poor, and though after the fire of *London*, houses were built upon the ground for the use of private individuals, who as occupiers of those houses were rateable and rated; yet being returned to its original use, the use of the poor, and appropriated as a means of preserving their health, without any profit to the corporation, the court held that the governors, who were merely trustees for the poor, ought not to be rated for it. Therefore I am satisfied with my own opinion in saying, that the grounds and reasoning in the two cases of *St. Bartholomew* and *St. Luke* are alike. The principle is this, that by the stat. 43 *Eliz.* *c.* 2. no man can be rated except as an occupier or inhabitant. Mr. Justice *Yates* indeed started a doubt, whether a corporation could be rated as inhabitants or occupiers, and did say, I believe, what has been mentioned, namely, that a corporation cannot be an inhabitant or occupier. This would have been a great authority, if the opinion had been given with consideration; but it was immediate, without time to reflect on it. But that point was not essential

* 4 *Burr.* 2435.

1774.

REX *versus* GARDNER.

to the deciſion, and all the court agreed in the determination of the caſe upon the other ground.

In this caſe, the queſtion is, whether a corporation ſeized in fee for their own profit, is rateable or not; which is a very different queſtion, and depends upon this point; whether in law a corporation may not be conſidered as occupiers or inhabitants? By the ſtatute of 43 *Eliz. c.* 2. all lands and all real property are rateable to the poor, and muſt have, except in the caſes juſt mentioned, occupiers and inhabitants in conſideration of *tax*: therefore if a man has no tenant, if he is ſeiſed of lands, *&c.* in fée, he is ſaid to occupy them himſelf or by his bailiff, *&c.*

Moſt of the old colleges are extraparochial, and upon that ground they are not rateable. But except upon that foundation there has been no inſtance cited that a corporation is exempted from this tax; and I can find no authority in point of law which ſays they cannot be rated. But there are ſome, that go very far to prove the contrary. The *firſt* I ſhall mention, though not the moſt ancient, is the *Ironmongers' company* verſus *Naylor*, reported in 2 *Mod.* 185. Sir *Thomas Jones* 85. 1 *Ventr.* 311. and 3 *Keble* 719. which was a diſtreſs for hearth-money: there was no doubt or queſtion in that caſe whether as a corporation they were rateable or not; but whether they could properly be ſaid to be the occupiers; the houſes for which the tax was levied never having been finiſhed. The court held they were. The authorities from 2 *Inſt.* 703. and 1 *Jones* 187. ſhew, that corporations are rateable both as inhabitants and as occupiers: and if liable in reſpect of the repairs of bridges and churches, they are equally ſo within the purview of the ſtat. 43 *Eliz. c.* 2.

The next objection made to this order is, that theſe areas yield no profit, and therefore ought not to be rated. The anſwer to that is, that the value is in the judgment of the aſſeſſors. If land undergoes any alteration, the aſſeſſors muſt take all the circumſtances into their conſideration when they are about to fix the value: It would be an abſurd rule to ſay, that lands not covered with houſes, ſhould pay the ſame as they did when houſes were ſtanding upon them. The rates muſt be according to the value of the thing to be rated; and the duties increaſe according to the increaſe of agriculture or improvement. But it ſeems a very extraordinary thing for the college to ſuppoſe that they are to take in all theſe lands and pay nothing for them. I do not ſay what value is to be ſet upon them, nor

will this determination give a ſanction to the particular value fixed by the preſent rate: but they muſt be of ſome value; and whatſoever the *quantum* may be, I am of opinion that the college in its corporate capacity is rateable in reſpect of it. 1774. REX *verſus* GARDNER.

Mr. Juſtice *Aſton*. I concur. The premiſſes in queſtion muſt be of ſome value: and as to the *quantum* it is the province of the overſeers to decide, not the court.—I have no idea but that a *corporation* may be *occupiers*: as ſuch, they may have inſpection of the rates; and upon an application to the court for that purpoſe, it would be no anſwer to ſay, they are an inviſible body; for they may inſpect them by their ſervants and the court would puniſh a refuſal by attachment.—As to the *remedy* of levying a duty upon a corporation; the books all agree that it can be levied, though they differ in the mode. *Sheppard* in his treatiſe upon corporations ſays, "If a ſum of money be to be levied "upon a corporation, it may be levied upon the mayor or chief "magiſtrate, or upon any perſon being a member of the corpo- "ration." The words are taken from *Styles* 367. and are what was ſaid by *Roll* C. J. in the caſe of the town of *Colcheſter*.—But 1 *Ventr.* 351. in the caſe of the City of *London* concerning the duty of water-bailage is different, and is thus: "Note, It "was ſaid, that for a duty or charge upon a corporation, every "particular member thereof is not liable; but proceſs ought to "go in their public capacity." And this is the right law. In *Thurſfield* verſus *Jones*, *Skin.* 27. the corporation were cited not by their *proper* names, but in their *politic* capacity: and the court ſaid, "if the company had neither land or goods there "was no way to make them appear: but if they ſtood out, "then they muſt lie by the heels in their natural capacity." Therefore the idea that a corporation is not liable to be rated, or amenable by proceſs in reſpect of a rate is not well founded.

By a late act 17 *Geo.* 2. *c.* 38. the remedy of diſtreſs is extended beyond the particular pariſh, into other precincts, and even into other counties. So that their property is anſwerable though they cannot perſonally be puniſhed.

Therefore I am clearly of opinion that as a corporation they are liable to be rated, and that the order of ſeſſions is good: though, in reſpect of the *quantum*, an appeal is ſtill open if the college think themſelves aggrieved. Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

The court ordered that the order of ſeſſions be quaſhed ſo far as the ſame relates to the porter and butler therein mentioned,

1774. ed, and that the reſt and reſidue of the matters therein contained be affirmed.

Tueſday, June 7th.

The Mayor of LYNN *verſus* TURNER.

CASE againſt a corporation for not *repairing* a *creek* into which the tide of the *ſea flowed and reflowed* (but not ſaying it was a *navigable river*), as *from time immemorial* they had been uſed, the action lies, tho' no ſpecial damage be ſtated.

ERROR from a judgment of the court of *common pleas* in an action upon the caſe againſt the corporation of *Lynn Regis* for not repairing and cleanſing a certain creek or fleet called *Dowſhill fleet* into which the tide of the ſea was accuſtomed to flow and reflow as from *time immemorial they had been uſed*, whereby the ſea was prevented from flowing therein, ſo that the ſaid creek was rendered unnavigable, and the plaintiff obliged to carry his corn round about. The declaration conſiſted of nine counts: the *ſecond* count ſtated *no ſpecial damage*, but only charged generally, that the plaintiff had loſt the uſe of his navigation. Judgment by *nihil dicit* and damages upon a writ of inquiry.

And ſaying "*as from time immemorial they had been uſed*" is well enough, without alleging that they were bound, *&c. ratione tenuræ*, or other ſpecial cauſe.

Mr. *Baldwin* for the plaintiff in error. If any one count is bad, the judgment may be ſet aſide. Upon the face of this record it appears that the *locus in quo* is a navigable river, where the tide flows and reflows, and the ſecond count is general without any ſpecial damage being ſtated. If ſo, the injury complained of is not the ſubject of an action but of an indictment. For wherever a river flows and reflows it is in the nature of a highway, and is common to all. *Davis* 56. *Sid.* 149. 1 *Mod.* 105. 1 *Salk.* 357, and where an injury is received by a nuiſance or obſtruction in a highway, it is incumbent on the party to ſhew a particular damage: otherwiſe an action does not lie. 1 *Inſt.* 56. *Carth.* 191. *Cro. Eliz.* 664. 5 *Co.* 73.

Lord *Manſfield*. *Ex facto oritur jus*. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it ſo; for there are many places into which the tide flows that are not navigable rivers; and the place in queſtion may be a creek in their own private eſtate.

Mr. *Baldwin*. Then it was incumbent on the plaintiff to ſhew a ſpecial reaſon or tenure why the corporation ought to repair, for they are not bound of common right. 2 Lord *Raym.* 1089. 1 *Salk.* 360. S. C.

Lord

Lord *Mansfield*. It is here alleged that the corporation have from time immemorial been uſed to repair. It ſtates, therefore, that they are bound by preſcription, and it might be the very condition and terms of their creation or charter. 1774. Mayor of LYNN *verſus* TURNER.

The three other judges concurred.

Let the judgment be affirmed.

HARWOOD *verſus* GOODRIGHT, Leſſee of ROLFE.

Tueſday, June 7th.

A ſubſequent will, though it be found to contain a different diſpoſition from a former, if the particulars of that difference be unknown, is no revocation of ſuch former will.

ERROR from the *Common Pleas* upon a judgment in ejectment of a ſet of chambers in *Lincoln's-Inn*. The cauſe was tried before Sir *William de Grey*, Lord Chief Juſtice of the court of *Common Pleas*, at the ſittings after *Trinity* term 1773; when the jury found a ſpecial verdict, ſtating in ſubſtance as follows:

That *John Lacy* of *Lincoln's-Inn* Eſq; on the 16th day of *April* 1748, being ſeiſed in fee of the chambers and premiſſes in the declaration of ejectment mentioned, and poſſeſſed of a conſiderable perſonal eſtate, and alſo entitled to the intereſt of 10,000 *l.* by virtue of the marriage ſettlement of his father of the 3d of *April* 1688, and a private act of parliament, (by which the ſaid ſum of 10,000 *l.* was directed to be raiſed and laid out in the purchaſe of lands, and which was raiſed accordingly, but never inveſted in land,) made his will in writing duly atteſted to paſs real eſtates; and did thereby deviſe as follows; that is to ſay, "I *John Lacy*, of *Lincoln's-Inn* in the county of *Middleſex*, do "make this my laſt will and teſtament with my own hand, as "follows; I give, deviſe, and bequeath, all my real and perſonal eſtate, of what nature or kind ſoever, or whereſoever it "be, unto my dear and well-beloved friend Mrs. *Frances Harwood* now of *Maiden Lane* in the pariſh of *Covent Garden*, "*Weſtminſter*, and her heirs, executors, adminiſtrators, and aſſigns for ever; deſiring her to pay certain legacies: and I do "hereby conſtitute and appoint the ſaid Mrs. *Frances Harwood* "to be the ſole executrix of this my laſt will and teſtament, "revoking all others by me heretofore made." That in the ſummer of the year 1756, the ſaid *John Lacy* of *Lincoln's-Inn*, being in like manner ſeiſed as before mentioned, did make and duly publiſh *another* will and teſtament in writing, in the preſence

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ſence of three ſubſcribing witneſſes, who duly atteſted the ſame. That the *diſpoſition* made by the ſaid *John Lacy*, by the ſaid will of the year 1756, was *different from the diſpoſition* in the ſaid will of 1748; *but in what particulars is unknown to the ſaid jurors*; but the ſaid jurors ſay, that they do *not* find that the ſaid teſtator *cancelled* his ſaid will of the year 1756, or that the ſaid defendant deſtroyed the ſame; but what is become of the ſaid will, the jurors aforeſaid are altogether ignorant. That the ſaid teſtator *John Lacy* Eſq; died in *June* 1767 ſeiſed in fee of the ſaid premiſes in the ſaid declaration mentioned, without iſſue, and was never married. And that the ſaid *Elizabeth*, the wife of the ſaid *William Relfe*, the leſſor of the plaintiff, is the neice and heireſs at law of the ſaid teſtator *John Lacy*.

The queſtion was, Whether the deviſe in the will of 1748 to the defendant was revoked by the will found to be executed in 1756?

De Grey Chief Juſtice, *Gould* and *Nares* Juſtices gave judgment in the *Common Pleas* for the leſſors of the plaintiff againſt the opinion of Mr. Juſtice *Blackſtone*; upon which judgment this writ of error was brought.

Mr. *Davenport* for the plaintiff in error. This caſe muſt be decided upon two or three leading principles.

Firſt, That as there is a clear indiſputable title in Mrs. *Harwood* under the will of 1748, the leſſor of the plaintiff in ejectment muſt ſhew a ſubſequent title equally clear and indiſputable.

Secondly, A ſubſequent ſubſtantive independent will of lands is not in itſelf a revocation of a former will, nor will operate as ſuch, unleſs it contain expreſs words of revocation, or a deviſe of the ſame lands repugnant to and inconſiſtent with ſuch former diſpoſition. *Cro. El.* 721. *Cro. Jac.* 94. and the caſe of *Hitchen* verſus *Baſſet*, reported in 1 *Show.* 537. *Hardr.* 374. 2 *Salk.* 592. *Comberb.* 90. and 209. 3 *Mod.* 203. *Show. Parl. Caſ.* 146. where this point was at laſt finally ſettled and adjudged.

But *thirdly*, ſuppoſe a ſubſequent independent will of lands would revoke a former, yet it muſt appear what the contents of ſuch latter will are. For the mere finding another will does not *ex vi termini* find a repugnant or different diſpoſition: and twenty deviſes of the ſame lands may ſtand together, unleſs they are inconſiſtent

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Lord *Mansfield* aſked the counſel, if they had conſidered whether in point of law the court could grant a *venire facias de novo* after a writ of error brought: and inſtanced two caſes, *Haſwell* verſus *Challice*, and *Rex* verſus *Kynaſton* where the Houſe of Lords had done ſo: adding, that the Houſe of Lords could not, as a court of error, have ſuch juriſdiction, unleſs the court of *King's Bench* had the ſame.

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Mr. Serjeant *Hill contrà*. The notion and doctrine of wills, ariſes from the civil law, and is borrowed from it: The notion reſpecting expreſs revocations was eſtabliſhed by the ſtat. 32 *H.* 8. *c.* 1. before which ſtatute there could be no will of lands except by cuſtom. But preſumptive revocations exiſted before that act. The notion that a ſubſequent will is a revocation of a former, is founded on the nature of the inſtrument itſelf; becauſe if it were the intention of a teſtator that his firſt will ſhould ſtand at the time of making a ſecond, the latter would be a codicil, and not a will. Therefore, wherever there are two independent wills, the latter is a revocation of the former. *Swinburne* 15. No man can die with two teſtaments, becauſe the latter does always infringe the former, 523. *S. P. Perkins, ſect.* 478. *Shep. Touchſtone* 410. *Hardr.* 376. *per Hale C. B.* Apply this doctrine to the preſent caſe. It is found that the will of 1756 was duly atteſted to paſs real eſtates, and that the teſtator, who was eminent in the law, had no real eſtate but the chambers in *Lincoln's Inn*. This is ſtrong evidence of a change of intention in the teſtator, and conſequently ſufficient to prove, that the new diſpoſition was different from the former: otherwiſe it was nugatory to make it. At leaſt the execution of the ſecond will renders it very doubtful, whether Mrs. *Harwood* is entitled to any thing; and it is a ſettled rule, that where it is uncertain who is to take, the heir at law ſhall be entitled. The caſe of *Hitchins* verſus *Baſſett* is in favour of the defendant in error: for the grounds upon which the court decided that caſe were, that there was no proof of any change of intention whatſoever in the deviſor, or that the ſecond will in any way related to or affected his lands. But in the preſent caſe, it is ſufficiently found by the *mode* of deviſing, that the ſecond will did relate to lands, and to the very eſtate in queſtion; becauſe he had no other real eſtate; and it is expreſsly found that the diſpoſition of 1756 is different from the diſpoſition in 1748. Therefore, under all the circumſtances, this finding amounts to an expreſs revocation of the will in 1748.

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Lord *Mansfield*. Let it ſtand for a ſecond argument: but I will juſt ſtate the ſhort compaſs in which the queſtion lies. Though, as to perſonal eſtate, the law of *England* has adopted the rules of the *Roman* teſtament, yet a deviſe of lands in *England* is conſidered in a different light from a *Roman* will. For a will in the civil law was an inſtitution of the heir. But a deviſe in *England*, is an appointment of particular lands to a particular deviſee; and is conſidered in the nature of a conveyance by way of appointment; and upon that principle it is, that no man can deviſe lands which he has not at the date of ſuch conveyance. It does not turn upon the conſtruction of the ſtat. 32 *H.* 8. *c.* 1. which ſays, that "any perſon having lands, *&c.* "may deviſe." For the ſame rule held before the ſtatute, where lands were devifable by cuſtom.

It is upon the ſame principle, but carried too far by ſubtlety, that there have been revocations determined contrary to the intent of the teſtator; as where he has afterwards made a feoffment or the like; becauſe that has been conſtrued a new appointment. Such is the difference between the *Roman* will and a deviſe of lands in *England*.

But it may be ſaid, that if there is a complete ſecond will, it cannot do otherwiſe than revoke a former: for if it is only a variation or *ſubtraction* from a former will, it is in the nature of a codicil. Now with regard to land, a ſubſequent deviſe of land muſt be inconſiſtent with a former deviſe of the ſame land, or the firſt will ſtand as a good ſubſiſting deviſe; for if the teſtator gives it to *A.* and does no other act which will tranſfer it to a third perſon, the original deviſe to *A.* remains good. There muſt therefore be an inconſiſtent diſpoſition in the whole or in part; if there be an inconſiſtency in part, it is a revocation as to that part only. As where a teſtator deviſes an abſolute eſtate in fee to *A.* and afterwards, by a ſubſequent deviſe, gives him only an eſtate-tail in the ſame land; it is a revocation to the extent of the difference between an eſtate-tail and an eſtate in fee.

In the preſent caſe, the queſtion ariſes upon certain facts found by the ſpecial verdict; but the argument has gone upon preſumption only: and much has been ſaid which would have been very fit for the jury to have conſidered. The opinion of the court muſt be guided by concluſions drawn from the facts ſtated, which are; That the defendant had a title by deſcent: but a will is found which defeats that title. It is not found that

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that this will was revoked. But the jury find that the teſtator made a ſecond will. It is ſtated that the diſpoſition made by this ſecond will is *inconſiſtent* with the deviſes contained in the former? No; but they find it to be *different*: and if the verdict had reſted there, there might have been a ground of argument to ſay, that *different* was a general finding applicable to the whole will, and therefore it muſt mean *totally* different. But the jury go on to ſay, that *they do not know wherein the difference conſiſts*. If the jury cannot find it, the court in ſuch caſe cannot preſume the difference. The jury might have had evidence to prove an inconſiſtent diſpoſition or circumſtances to lay a fair foundation for preſuming it to be ſo, as ſpoliation or the like: but no ſuch circumſtance appears; they merely find a ſecond will, and as to what alteration it made in the former, they ſay they are totally ignorant. How then can the court ſay it? For the court cannot preſume any thing. The mere circumſtance of making a ſecond will is not in itſelf a revocation of a former: for the teſtator may cancel ſuch latter will, and it has been ſettled that if a man by a ſecond will even revoke a former, yet if he keep the firſt will undeſtroyed, and afterwards deſtroy the ſecond, the firſt will is revived. In this caſe the jury do not ſay a ſyllable as to the ſecond will being in *eſſe* at the time of the teſtator's death. The matter ſeems to me to lie here. It muſt be ſhewn that upon this ſpecial verdict the jury have found the ſecond will to be in ſome particular repugnant to or inconſiſtent with the firſt: whereas the only reaſon that has been aſſigned for ſuppoſing it to have been different from the firſt, is that the teſtator made another will.

Afterwards in *Mich.* Term it was argued by Mr. *Wallace* for the plaintiff, and Mr. *Lee* for the defendant, when Lord *Mansfield*, after ſtating the caſe, delivered the opinion of the court as follows:

Each party inſiſts that upon this ſpecial verdict there is a title found in their favour: the plaintiff (now defendant in error) ſays there is a clear title for him, as *heir at law*; the defendant, that there is a clear title for her, as *deviſee*: and neither party has contended, that there is any ſuch defect or repugnancy in this verdict, as to render it uncertain for the court to proceed upon it, and I think rightly: for there is a title found for one or the other. Nor has either ſide moved for a *venire facias de novo*; if they had, this court as a court of error could have granted it.

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In conſidering this ſpecial verdict, the duty of the court is to draw a concluſion of law, from the facts found by the jury; for the court cannot preſume any fact from the evidence ſtated. Preſumption indeed is one ground of evidence; but the court cannot preſume any fact. In caſe the defendant had been proved to have deſtroyed this laſt will, it would have been a good ground for the jury to find that this was a revocation. But the jury on the preſumption muſt have found the fact. So with regard to all the other circumſtances; ſuch as the preſuming it to be in her hands, and that there were three atteſting witneſſes to the will: theſe would have been proper for the jury to have conſidered; but we are confined to the facts found by them: which are as follow:

They have found the defendant to be heir at law of *John Lacy*: as ſuch he would have a clear title if there were no other claimant by ſettlement or will. The title of an heir at law is not to be defeated by conjecture, ambiguity, or uncertainty; and even where there is proof of a will having exiſted, which however does not appear, the court cannot go into conjecture what it is probable the teſtator may have done by that will; but it muſt be ſhewn to contain an actual expreſs deviſe which diſinherits the heir at law. But in the preſent caſe, the jury have found a clear title againſt the heir at law: for they have found a good ſubſiſting will, properly atteſted, and an expreſs deviſe to the plaintiff in error, concerning the conſtruction of which there is no doubt. For even in the caſe of an actual deviſe, a proper meaning, as I have before ſtated, muſt be found to diſinherit the heir at law. Here a clear deviſe is given againſt him: therefore he muſt get rid of this title and prove his own by other facts to be found in this verdict; which if it were the truth of the caſe he might do, either by ſhewing that the will under which the deviſee claims is revoked, or that the teſtator had no power to deviſe. In this caſe there is no diſpute as to the teſtator's power to deviſe: therefore a revocation muſt be ſhewn, and the mode of doing that is by another will. But that is not all; for he muſt ſhew in fact, that it was *revoked* by another will which *ſubſiſted* at *the death* of the teſtator; becauſe if a teſtator makes one will and does not deſtroy it, though he makes another at any time virtually or expreſsly revoking the former; if he afterwards deſtroy the revocation, the firſt will is ſtill in force and good.

If a ſubſequent will, either virtually or expreſsly revoking a former will, be deſtroyed, the former, if ſubſiſting, is revived.

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But what is there in this caſe to ſhew, that the will of 1756 ever revoked the deviſe of the chambers in queſtion? The plaintiff in the original cauſe reſts it on two grounds: Firſt, that there is a contrary deviſe, if it can be made out; the clear anſwer is, if there is a contrary deviſe, it is againſt the heir. But it is contended, that, becauſe the jury ſay there was a different diſpoſition, the court is to preſume that there was a different diſpoſition of the ſubject-matter in queſtion. Properly ſpeaking, *another* will cannot exiſt without there being a difference: becauſe, if it be exactly the ſame, it is no more than a duplicate or a republication of the firſt will: the jury therefore finding it to be another will, *ex vi termini* ſay, it was different.

It is neceſſary in a perſonal teſtament to make an executor, but not ſo to a deviſe of lands, which muſt be revoked expreſsly by a ſubſequent will. The jury here have not found any revocation of the former will: nor is there any in point of law; for the mere circumſtance of making another will is not virtually a revocation of a will of land. I can ſee no difference between the caſe of *Killigrew's* will and this. For in that caſe, the jury, by ſaying there was *aliud teſtamentum*, certainly found a difference: here they ſay it was different, but add, that they do not know in what the difference conſiſts: this ſpecial verdict therefore does not find a revocation.

The ſecond ground which the defendant reſts upon is this; that it is uncertain whether the will be revoked or not; and where the heir at law claims, his title ſhall never be taken away by an uncertainty. But this is all a fallacy; for here the deviſee does not ſet up an uncertainty; ſhe ſhews a clear title under the will of 1748. On the contrary it is the heir at law who ſets up an uncertainty againſt her. Upon the whole, I think the jury have not expreſsly found that the deviſe of the chambers in the will of 1748 was revoked by the will in 1756. Therefore,

Let the judgment be reverſed.

Afterwards, upon an appeal to the Houſe of Lords, the judgment of the court of *King's Bench* was affirmed: the barons of the Exchequer attended (except Mr. baron *Perrot*) and were all of opinion with the Judges of the *King's Bench*. *Paſch.* 15 *Geo.* 3.

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Same day. One poſſeſſed of three ſpecies of eſtates in the county of *H.* viz. one by articles *wholly executory*, another *executory in part* and a third (being an *advowſon*) completely *executed* by a *recent* conveyance, deviſes to his wife as follows: "All the "manors, "meſſu- "ages, *ad-* "*vowſons* "and here- "ditа- "ments in "the coun- "ty of *H.* "for the "*purchaſe* "whereof "I have "already "*contracted* "and "*agreed*, "or in lieu "thereof, "the mo- "ney ari- "ſing by "the ſale "of my "real eſ- "tate in "the coun- "ty of *L*;" (with directions for completing the contracts).—The advowſon, the purchaſe of which was completely executed before the making of the will, ſhall paſs.

ERROR from the *Common Pleas* upon a judgment in *Quare impedit* of the advowſon of the church of *Mottiſont* alias *Motſon Eaſt Dean*, and *Lockerly* in the county of *Southampton*, claimed by the plaintiff in error, under a grant made to him in fee, 2d *December* 1766, by Lady *Broughton Delves* widow of Sir *Brian Broughton Delves* deceaſed; who claimed ſuch advowſon as *deviſee under the will of her late huſband Sir Brian*. The cauſe was tried at the aſſizes holden for the county of *Southampton* on the 26th of *July* 1773, when the jury found a ſpecial verdict in ſubſtance as follows:

"That on the 13th of *June* 1763, Sir *Brian* contracted by "articles of agreement with Sir *Thomas Gatehouſe*, for the pur- "chaſe of the manor of *Upper Clatford* in the county of *Hants*, in "conſideration of 10,000 *l*; the purchaſe money to be paid, and "the conveyance completed, on or before the 25th of *March* "1764. That, on the 30th of *October* 1763, Sir *Brian* further "contracted by articles with the honourable *Thomas Pitt*, for "the purchaſe of the manor of *Abbots Ann*, and alſo the ad- "vowſon of the pariſh church of *Abbots Ann* in the county of "*Southampton*, in conſideration of 24,000 *l*; 7000 *l*. being "*paid* in *part*, and the remaining 17,000 *l*. to be paid at the "time of completing the purchaſe and executing the convey- "ance; which was to be on or before the 25th of *March* 1764. "—That on the 10th of *February*, 1764, Sir *Brian* purchaſed "of *Thomas Fuller* and others, and took a conveyance to himſelf "in fee of the advowſon * of *Mottiſont* in the county of *Hants*, "in conſideration of 2,500 *l*. the money being paid down and "the deed executed on that ſame day."

That being ſo ſeiſed in fee of the ſaid advowſon of *Mottiſont*, and being entitled in equity to the ſeveral eſtates contracted for by the ſaid articles, which then remained to be carried into execution, and being ſeiſed in fee of divers manors and eſtates in the county of *Stafford*, and of certain copyhold eſtates of inheritance in *Suffolk*, and of a ſmall freehold eſtate in the county of *Salop*, and ſeiſed for his life (under his marriage ſettlement) of divers manors and eſtates in the county of *Cheſter*, with remainder to his firſt and other ſons ſucceſſively in tail male, (ſubject to her jointure of 1000 *l*. a year, and to one other jointure of 1000 *l*. a year to his mother,) with reverſion to himſelf in fee; and being likewiſe ſeiſed in fee of

* The *advowſon* in queſtion.

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a real eſtate in the county of *Lincoln*, which he had contracted to ſell by articles to *George Foſter Tuffnell* Eſq. in conſideration of 27,000*l.* which was to be paid on completing the purchaſe; DID, on the 21ſt *May* 1764, duly make and publiſh his laſt will and teſtament; wherein, after bequeathing his dwelling-houſe in town, together with his jewels, plate, houſehold furniture, *&c.* to his wife Lady *Mary Broughton Delves*, her heirs, executors and adminiſtrators reſpectively, to and for her and their own proper uſe and benefit; he proceeds thus:

Clauſe upon which the queſtion ariſes.

"*Alſo I give, deviſe, and bequeath to my* ſaid wife and her heirs, to and for her and their own proper uſe and benefit, *all the manors, meſſuages,* ADVOWSONS, *farms, lands, tehements, hereditaments, and real eſtate whatſoever, ſituate and being in the county of* HANTS, FOR THE PURCHASE WHEREOF I HAVE ALREADY CONTRACTED AND AGREED, *with all and every the appurtenances, and all my right, title, and intereſt, in and to the ſame;* OR IN LIEU THEREOF *the whole money ariſing by the ſale of all my real eſtates in the county of Lincoln, and* SUCH FURTHER SUM AND SUMS *of money as together with the money ariſing from ſuch ſale ſhall be ſufficient to enable my ſaid wife or her heirs to* COMPLETE *the ſeveral* CONTRACTS *I have made as aforeſaid, for the purcheſe of the* SAID ESTATE AND PREMISES *in the county of Hants; in truſt nevertheleſs to* COMPLETE *the ſaid* PURCHASES, *and to procure and take* CONVEYANCES *of the ſame eſtates, in the county of Hants, to her and their own proper uſe and benefit.*" He alſo gave to truſtees and their heirs, all and ſingular *his* manors, meſſuages, *advowſons*, farms, lands, tenements, tithes, hereditaments and real eſtates whatſoever, ſituate, ariſing, and being in the counties of *Staffoſd* and *Cheſter*, or either of them, to the uſe of his brother *Thomas Delves* for life, with remainder to his iſſue in ſtrict ſettlement, with divers remainders over. And then, after certain pecuniary legacies, the teſtator gave all the reſidue of his perſonal eſtate to his brother the ſaid *Thomas Delves*.

"That the *ſaid articles of 13th June, and 30th of October* 1763, were *in force at the time of making his ſaid will;* and that ſince his death, the reſpective premiſes had been conveyed to Lady *Broughton Delves*. That at the time of making his ſaid will, Sir *Brian* was ſeiſed of *no other advowſon in the* county of *Southampton*, except the *advowſon of Mottiſfont*, compriſed in the conveyance of the 10th of *February* 1764; nor had he *contracted* for the purchaſe of any manor, meſſuage, *advowſon*, &c. in the county of

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of *Southampton*, which *reſted in contract*, other than thoſe mentioned in the articles of 13th *June* and the 30th of *October* 1763: Nor was he ſeiſed of or entitled unto any *advowſon* or *advowſons* in the *counties of Stafford or Cheſter*. That, on the 1ſt of *February* 1766, the ſaid Sir *Brian* died without revoking or altering his ſaid will, and without iſſue; leaving *Thomas Delves* his only brother and heir at law, now Sir *Thomas Broughton*. That the ſaid Sir *Thomas Broughton*, on the 6th *June* 1772, conveyed the advowſon of *Mottisfont* to *Robert Hill* clerk and his heirs for the ſum of 3,825 *l.*

The queſtion ariſing upon this verdict was, "Whether the "*ſaid advowſon of the church of Mottisfont paſſed to Lady* "*Broughton Delves the teſtator's widow, by virtue of that clauſe* "*in his will, whereby the teſtator gave and deviſed to his* "ſaid wife all manors, meſſuages, *advowſons*, &c. in the county "of *Hants for the purchaſe whereof he had contracted and* "*agreed:* for if not, then the ſaid advowſon, being undiſpoſed "of by the ſaid will, deſcended to the ſaid Sir *Thomas Broughton* "as heir at law to the ſaid teſtator?"—The court of *Common Pleas* were of opinion, that the advowſon of *Mottisfont* did *not* paſs by this clauſe to Lady *Broughton Delves*; and gave judgment for the now defendant in error, upon which judgment this writ of error was brought. This caſe was argued twice; firſt in *Eaſter* term 1774, by Serjeant *Walker* for the plaintiff, and Serjeant *Glynn* for the defendant, and now in this term, by Mr. *Manſfield* for the plaintiff, and Mr. *Dunning* for the defendant.

For the plaintiff it was contended, that this was an *expreſs* deviſe to Lady *Broughton* of the advowſon of *Mottisfont*, it being ſituate in the county of *Hants*, and not only *contracted for* but *actually conveyed* to the teſtator *before* the making of his *will*: that a contrary conſtruction would render the word "*ad-* "*vowſons*" in the *plural* number of *no effect*; the teſtator not having *contracted* for any *other advowſon* in *Hampſhire* except the advowſon in queſtion, and that of *Abbots Ann*: and, therefore, that the rule of law, which in the expoſition of all inſtruments, and more eſpecially of wills, prefers ſuch a conſtruction as will give effect to every expreſſion in them, ought to prevail in this caſe.—To this point was cited the caſe of *Mirril* verſus *Nichols*. 2 *Bulſtr.* 176. where "a teſtator, having *two ſeveral* "*moieties* of lands by *ſeveral purchaſes* in *Kent* and in *Eſſex*, "deviſed

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" deviſed as follows: *And as to my moieties*, I deviſe *all my* " *moieties in Kent unto B.*" and made no mention of the *moiety in Eſſex*: but the court held that *both paſſed*, for the words being " *All his moieties*," the intention of the teſtator could not otherwiſe be ſatisfied. So in the caſe of *Thorpe* verſus *Thompſon*, 2 *Leon.* 120. *Ander.* 188. S. C. where *A.* purchaſed land of *B.* but *before any conveyance executed B.* ſold the land to *C.* and then *A.* conveyed to *C.* who being thus ſeiſed deviſed it thus: " I bequeath to *R.* my ſon, all my land which I *purchaſed* of *B.*" whereas in ſtrictneſs of law he purchaſed them of *A.* by virtue of the conveyance made to him by *A.* But the court held the deviſe good, it being a ſufficient deſcription of what land the teſtator meant. They cited likewiſe the caſes of *Cheſter* verſus *Cheſter*, 3 *P. Wms.* 56. *Goodright* on the demiſe of *Paul* v. *Paul*, 2 *Bur.* 1089. and *Dyer* 376. And agreeable to the doctrine laid down by theſe authorities, inſiſted, that, in the preſent caſe, the words " *contracted and agreed for*" ought *not* to be conſtrued *reſtrictive* of the *general expreſſion* " *All my manors, lands, meſſuages* and ADVOWSONS," ſo as to exclude the *advowſon actually purchaſed*; becauſe, in ſtrictneſs of language, no eſtate can be ſaid to be *purchaſed* without being *firſt contracted and agreed for*. But further, the teſtator's *intention* to deviſe the advowſon in queſtion, which ought to be the *rule* of conſtruction in this caſe, was manifeſt, from his uſing the word " *advowſons*" in the *plural* number; and again from the expreſſion " *already*" which was a ſtrong proof that he meant to include all the real property in *Hampſhire* of which he was *then* the owner. That in the common acceptation and meaning of the words " *contracted* " *and agreed for*," there was no diſtinction between *them* and a *purchaſe*, and that in equity ſuch a contract would be a very good purchaſe.

On the part of the defendant it was inſiſted, that an heir at law ought not to be diſinherited by any other than a *neceſſary implication*: that in the preſent caſe, the words " *for the purchaſe* " *whereof I have already contracted and agreed*" could not by any *neceſſary inference* be extended to relate to a purchaſe *actually completed*; nor indeed by any poſſible conſtruction whatſoever, unleſs a contract executory means the ſame as a contract actually executed. That ſuch an interpretation would go the length of making them include any purchaſe however *diſtant*, as well as one of a more *recent* date: in which caſe no line can be drawn between a ſpace of three months, and one of three-ſcore years.

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For the *reſting in contract* being a *deſignatio rei* muſt ceaſe to be applicable to an eſtate on the inſtant of the purchaſe being *completed*, or muſt continue applicable to it *for ever*.—That if no other circumſtance however was ſufficient to explain the teſtator's meaning, the words immediately following the words "*agreed* "*for*" were of themſelves deciſive: namely, "*or in lieu thereof*, "*the whole money ariſing from the ſale, &c. as together, &c. ſhall* "*be ſufficient* to *enable my ſaid wife, &c.* to *complete* the *ſeveral* "*contracts* as *aforeſaid*." The eſtates therefore meant to be deviſed by the teſtator as included under the above deſcription, muſt of neceſſity be ſuch *only*, *the contracts for the purchaſe of which were ſtill ſubſiſting*, and which might or might not for ever remain incomplete at the option of the teſtator's wife and her heirs; the money given in *lieu thereof* amounting in the one caſe to a full ſatisfaction, and in the other to the expreſs ſum requiſite to *complete* ſuch *contracts*. Again the ſubſequent direction to Lady *Broughton*, to procure and take proper conveyances of theſe eſtates, excludes all poſſibility of ſuppoſing that the teſtator had in contemplation at the time of this deviſe, a reference to an eſtate, concerning which no *contract* was *ſubſiſting*, for *completing* the *purchaſe* of which *no money was due*, of which *no conveyance* remained to be *procured or taken*, but which had *before the making of his will* been *completed*, *purchaſed* by, and *conveyed to the* teſtator.—That no deduction to be drawn from the teſtator's uſing the word "*advowſons*" in the *plural* number could avail the plaintiff in this caſe; becauſe the ſame expreſſion is uſed by him in the deviſe of his *Staffordſhire* and *Cheſhire* eſtates, where it appears that he had *no advowſon* at all. On the contrary, it was plain from this circumſtance, that the teſtator meant to uſe it merely in a *general* and *comprehenſive*, not in any *particular ſenſe*.—That even the common *preſumption* that a teſtator does not intend to *die inteſtate* as to any part of his eſtates could not obtain here, as he had actually done ſo in reſpect of his eſtates in *Suffolk* and *Salop*: that there was as little ground therefore for ſupplying a diſpoſition of the advowſon of *Mottisfont* about which the will was likewiſe perfectly ſilent, as there would be of them: that in either caſe it could be founded in conjecture only; which by no rule of law is ſufficient to diſinherit an heir at law.

Lord *Mansfield*. If this queſtion had come before the court preciſely under the ſame circumſtances as it did in the caſe of *St. John*

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John verſus *Errington* *, the opinion given then, would have no influence upon the opinion that is now to be given. On the contrary, the judgment which has ſince been delivered by the court of *Common Pleas* would conſiderably ſhake that deciſion.

An heir at law cannot be diſinherited by conjecture. It can only be done by expreſs words, or by an implication which manifeſtly indicates the clear intent of the teſtator, upon a fair conſtruction of the whole contents of the will, to give the eſtate from him.

I have ſtruggled as much as I could to agree with the judgment of the court of *C. B.* in this caſe; and I thought yeſterday I had perſuaded myſelf to do ſo: but upon reading the whole of the will attentively, and finding the circumſtance of the money ſuppoſed in the argument to be given by way of equivalent, to be founded on a miſtake, I cannot ſatisfy myſelf to reject the words of the teſtator in this caſe. He has made uſe of the word "advowſons," and the whole diſpute is, whether the word "advowſons" ſhall be underſtood to mean *advowſons*, ſo as to convey an idea, that the teſtator underſtood the real force of the expreſſion at the time; or whether it is to be rejected, as being merely inſerted by him among other *general* words, without any particular meaning or intention annexed to it.—If it is to be underſtood as applied to theſe *two*, there is no doubt but it will include the recent purchaſe, and in that caſe there is an end of the queſtion. To be ſure, there might be caſes, where from the ſubject-matter, it ought to be rejected; but the preſent is a caſe under very particular circumſtances. It is manifeſt from the facts ſtated in the ſpecial verdict, that the teſtator's object was to buy eſtates in *Hampſhire*; and to enable him in part to do ſo, he intended to ſell his eſtates in *Lincolnſhire*: and all this was upon one plan, which he was carrying into execution, and wiſhed to complete in as little an interval as circumſtances would admit of. The dates of the ſeveral tranſactions are very material.

* *St. John* verſus *Errington*, *Hilary* term 13 *Geo.* 3. was an action of covenant for a defect of title in the conveyance of the 2d of *December* 1766 (the living being then full): and on a caſe reſerved in *B. R.* the court were of opinion that the *advowſon paſſed* by the *will*, and therefore the title was good. But the deviſe reſpecting the *Cheſhire* and *Staffordſhire* eſtates, and the fact of the teſtator having *no advowſon* in either of thoſe counties, though he there likewiſe uſes the word "*advowſons*" amongſt other general words, made no part of the caſe then before the court.

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On the 13th of *June* 1763, he contracts for lands in *Hampſhire* to the amount of 10,000. *l*; the money to be paid and the eſtates conveyed on or before the 25th of *March* 1764.

On the 30th of *October* 1763, he articles for other eſtates in *Hampſhire*, including an *advowſon*: he *pays* 7,000 *l*. in part, and the reſidue of the purchaſe money being a ſum of 17,000 *l*. was to be paid and the conveyance executed on the 25th of *March* 1764. In the intermediate time, that is, on the 10th of *February* 1764, he *purchaſes* the *advowſon* in *queſtion*, and has an immediate conveyance made to him upon payment of the purchaſe money.

So that there are three ſpecies of eſtates which he had to diſpoſe of. *One*, by articles that reſted *wholly executory*: another by articles *not wholly executory*, nearly a third part of the purchaſe money having been paid: and a third that had been *carried* into *execution* by a very recent conveyance. On the 24th of *May* following, Sir *Brian* makes his will. Whoever drew this will muſt have been privy to theſe recent contracts: one was totally executory, one executory in part, and the third a complete contract. He thought to include the whole under one deſcription: therefore, to ſhew ſuch general intention of the teſtator, he ſays "*for the purchaſe whereof I have* ALREADY "*contracted and agreed*," not, "for the purchaſe whereof I have "ONLY contracted and agreed." He did not intend any future purchaſe ſhould paſs; but only thoſe he had recently entered into. If he had ſaid "*only* contracted and agreed," the purchaſe of Mr. *Pitt*, of which great part of the purchaſe money had been advanced, would not have paſſed; becauſe that contract and agreement was more than made, it was partly carried into execution. He puts in the word "*advowſons*". Shall the meaning of this word be excluded becauſe he has uſed the expreſſion "for the purchaſe whereof I have already contracted and "agreed?" Has he in fact leſs agreed for a recent purchaſe, becauſe he has actually completed it? In point of *intention* I think it is impoſſible to conceive that he meant to except the particular advowſon in queſtion. An argument was greatly relied on that would have been very ſtrong indeed, if it had been well founded; which is this, that he could mean only to include the *executory* contracts, becauſe he has given *in lieu* thereof the money to ariſe from the ſale of the *Lincolnſhire* eſtates. Now every equivalent muſt be ſuppoſed to be co-extenſive with the thing for which it is intended as an equivalent. It has been

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ſaid that 27,000 *l.* the money ariſing from the ſale of the *Lincolnſhire* eſtates would juſt amount to the purchaſe money of the eſtates under contract executory in *Hampſhire*. But on looking into the will, the fact does not warrant the aſſertion; for though the words are "*in lieu thereof*" which implies an alternative, yet he could not mean to ſubſtitute the one for the other; becauſe 7,000 *l.* had been paid in part of one of the eſtates; and 27,000 *l.* was the ſum that remained to be paid in order to *complete* the ſeveral purchaſes. The ſum of 27,000 *l.* therefore is in fact 7,000 *l.* ſhort of the real value and purchaſe money of the eſtates under contract; conſequently it could not be intended as an equivalent for them, but only as a fund to complete the purchaſe.

The whole queſtion depends upon this ſingle point, whether there are words in the will ſufficient to paſs the advowſon in queſtion. If there are not, the heir cannot be diſinherited. But here the word "*advowſons*" is uſed; and, in order to decide for the heir, we muſt entirely reject it. I do not think we are at liberty to do ſo: becauſe I think the teſtator meant the word "*advowſons*" ſhould have its full force and effect: and no argument ariſes from his having inſerted the ſame word in the deviſe of his other eſtates, where in point of fact there were no advowſons: becauſe his object was to diſpoſe of all he was poſſeſſed of. Therefore I am of opinion that by the word "*advowſons*," *both* the advowſons paſs.

Aſton, Juſtice. The great ſtreſs of argument in *C. B.* was upon the words "in lieu thereof, *&c.*" making an alternative deviſe. I think it clearly otherwiſe; and that it was intended only as a fund to complete the purchaſes which the teſtator had agreed for with Sir *T. Gatehouſe* and Mr. *Pitt*, and had no relation to the advowſon already purchaſed. Therefore I concur in opinion with his lordſhip, that by the clear intention of the teſtator, and upon the plain and manifeſt meaning of the words, both the advowſons do paſs.

Mr. Juſtice *Willes*. I am of the ſame opinion.

Mr. Juſtice *Aſhhurſt*. I am of the ſame opinion.

Per Cur.

Let the judgment be reverſed.

Upon a writ of error in the Houſe of Lords the judgment of the court of *King's Bench* was affirmed.

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Wedneſday, June 8th.

A grant or charter from the *crown*, which ought to be by matter of *record*, may, under circumſtances, be *preſumed*, though *within time of legal memory*.—In this caſe the preſumption was founded on a poſſeſſion of 350 years and adjudged by the court a ſufficient ground.

UPON a rule to ſhew cauſe why a new trial ſhould not be granted upon the ground of a miſdirection to the jury, the caſe appeared, upon the report of Mr. Juſtice *Gould* who tried the cauſe, to be as follows. The declaration conſiſted of ſix counts, ſtating, that the plaintiffs on the 5th of *June* 1772, and *long before* and *ever ſince*, had received, and were lawfully entitled, and ſtill of right ought to receive, amongſt other tolls and duties, a *reaſonable toll* or *duty* called *water-bailiffs dues* for certain goods, ſpecified in the particular counts, imported into the port of *Kingſton upon Hull*; that the defendants having imported, *&c.* and being liable, *&c.* promiſed, *&c.* Upon the general iſſue pleaded, the plaintiffs at the trial produced 1ſt. an entry from their corporation books intitled as follows; "A particular note of "all ſuch duties, *&c.* as by the water-bailiffs are to be received, for "the uſe of the mayor and burgeſſes of *Kingſton upon Hull*; accor-"ding to the order preſcribed and ſet down in the year 1441, "*John Bedford* then being mayor; and continued and put in uſe "from that time to this preſent day 1ſt *April* 1575." In this liſt were included the duties in queſtion. 2dly, An order of the corporation of the 13 *Eliz.* requiring the water-bailiff, every eight or fourteen days to give an account of all monies received by him for the uſe of the town, to the chamberlain; with a direction to the latter, to keep theſe accounts ſeparate from his other receipts: then followed a particular account of theſe monies ſo received from 1545 to 1646: other entries, from 1648 to 1678, of perſons who had rented the office of water-bailiff; an account of the dues for three years in 1726; and concluded, by the parol teſtimony of ſeveral witneſſes who had paid the duties in queſtion from the year 1734, together with an eſtimate of repairs done by the corporation valued at 15,000 *l.*—On behalf of the defendant *contra*, it was obſerved, that the earlieſt book of the corporation was 16 *Ed.* 3. and the date of their original charter of incorporation 27 *Ed.* 1. a full century ſubſequent to the time of legal memory. That their title, if any, to the duties in queſtion could be ſupported only by preſcription or charter: That the firſt certainly did not exiſt, they being a corporation within time of legal memory: and in reſpect of the ſecond it was clear upon the face of a charter granted *anno* 5 *Ric.* 2. that the king at that time only erected or authorized the corporation to erect the port; but granted no duties. The words of this charter 5 *Ric.* 2. were

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as follows: *Conceſſimus quantum in nobis eſt*, &c. *quod habeant portum ſubtus eandem villam dudum vocat. Sayercreek jam Hull, in perpetuum annexum villæ, ita quod poſſint ædificare domos kaias et ſtaiethas, ad emendationem, defenſionem et ſalvationem villæ prædictæ.* To this it was anſwered, that an uſage of three hundred years was a ſufficient ground to preſume a grant of the duties in conſideration of repairs, which it was in proof the corporation had conſtantly done from the year 1441 to the time of bringing the action. Mr. Juſtice *Gould* in his direction to the jury ſaid he thought, and therefore left it to them to ſay, Whether the words *portum* DUDUM *vocat. Sayercreek* JAM *Hull* did not imply that the port ſo called was an *exiſting* port *before* and at the time of the charter 5 *Ric.* 2. rather than a *creation* of the port: and alſo, Whether they would not conſider the uſage from the year 1441 to the time of the action brought, a ſufficient ground to preſume a *grant* of the *duties* between the 5 *Ric.* 2. (*anno* 1382) and the year 1441. The jury accordingly found a verdict for the plaintiff.

Mr. *Wallace* and Mr. *Davenport* ſhewed cauſe. There are two queſtions. 1ſt. Whether a grant can be preſumed at all? 2d. Whether under the circumſtances of this caſe a grant ought to be preſumed?—1ſt. Circumſtances within time of memory may be a foundation to preſume a grant. In the caſe of *Powell* v. *Milbanke** a grant from the crown was preſumed; though within time of memory.

In 2 *Show.* 47. *Rex.* v. *Carpenter*, evidence of conſtant payment and an antient table of duties was held ſufficient ground to preſume a grant of water-bailiff dues (as in this caſe) on coals to the city of *London*, though the uſe of them was within the time of legal preſcription.—In *Warren ex dim. Webb* v. *Grenville* 2 *Str.* 1129. an *item* in an attorney's bill to make a tenant to the *præcipe* was held ſufficient evidence of the deed in ſupport of a

* *Coram* Lord *Mansfield*, Sittings after *Michaelmas* term 1772. The plaintiff declared for money had and received. On *non aſſumpſit* pleaded, it appeared in evidence, that the

chapel of *Cheſter le Street*, in the county of *Durham*, was in the crown from the diſſolution to the time of *Jac.* 1. who by letters patent under the ſeal of *England*, bearing date the 26th of *July* 1618, granted to Sir *James Ouchterlony* and *Richard Gurnard*, their heirs and aſſigns, All that the deanry, prebend, rectory and vicarage of the collegiate church of *Cleſter le Street*, in the biſhopric of *Durham*, with the following exception "Exceptis tamen ſemper et extra hanc preſentem "conceſſionem noſtram nobis heredibus et ſucceſſoribus noſtris omnino reſervatis omnibus et ſin-"gulis *advocationibus* donationibus liberis diſpoſitionibus et jur. perſonal. om. et ſingul. eccleſi-"aſtican. vicar. capell et al. beneficior. eccleſiaſticor quorumcumq; præmiſſ. ſuperius per pre-"ſentes præconceſſ. aut alicui inde parti vel parcellæ quoquo modo ſpectant. pertinent. incident. "appenden. vel. incumben."

In 1629, *anno* 5 *Car.* 1. the premiſes came by meſne conveyances to the *Hedworth* family, who afterwards granted to Sir *Ralph Milbanke*—That in 1694 Mr. *Heaworth* preſented Mr. *Conyers* to the curacy of *Cheſter le Street*, and that in 1735 Mr. *Lambe* was preſented by a deſcendant of the *Hedworth* family, and continued in poſſeſſion till 1769, when Sir *Ralph Milbanke* preſented the deſendant. Upon theſe facts, one point inſiſted on by the plaintiff was, that the exception in the grant left the title to this curacy in the Crown. But Lord *Mansfield* left it to the jury to ſay, Whether from the two adverſe nominations, and poſſeſſion under them, by the *Hedworth* family, they would not preſume a grant from the crown of the right of preſentation to the curacy. The jury preſumed a grant, and found a verdict accordingly.

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recovery of forty years ſtanding. But 12 *Rep.* 4. *Crimes* v. *Smith*, and 12 *Rep.* 5. *Bedle* v. *Beard and others* are in point. Therefore *ancient poſſeſſion* is clearly a ſufficient foundation to preſume a grant from the crown within time of legal memory.

2d. Whether in this caſe, a grant ought to be preſumed? If ancient poſſeſſion is a ſufficient ground, the corporation have unqueſtionably been in poſſeſſion of theſe duties 300 years and upwards; namely, from the year 1441. The water-bailiff's table is of that date, and that alone clearly could not be the origin of the claim. It is further in evidence, that the corporation have conſtantly repaired the port at an immenſe expence, which is a ſtrong ground to preſume a legal title. Therefore, if a grant is preſumable, it ought to be preſumed in this caſe.

3dly. The charter 5 *Rich.* 2. is a grant of an *antient* port then *exiſting* and not the *creation* of a *new* port: The words are *Portum* DUDUM *vocat. Sayercreek* JAM *Hull*; which ſhews that it had before been known by the name of *Sayercreek*, and was not then for the firſt time erected and made a port. If ſo, the grant incidentally carries the duties along with it, and the conſideration of the repairs is a good and valid conſideration.

Mr. *Dunning*, Mr. *Lee*, Mr. *Wilſon*, and *Mr. Norton* in ſupport of the rule.

1ſt. The queſtion is not, Whether in any caſe a grant is not preſumeable; becauſe every preſcription carries in itſelf preſumption of a grant; and in this caſe, if the date of the charter had been antecedent to the time of legal memory, the jury might very rightly have preſumed a grant of the duties. But the queſtion is, Whether an uſage which muſt have had its commencement within time of legal memory, is alone ſufficient to be left to the jury of a grant from the crown, which ought to be by matter of record? The law ſays, that ſuch evidence of an uſage as will ſupport a preſcription, is a ſufficient title; that is, a ſufficient ground to preſume a grant. If any uſage leſs than that were ſufficient, preſcription would be uſeleſs. Therefore it is not competent to the jury to preſume a grant, where the uſage does not refer back to the time of legal preſcription. The caſe in 12 *Co.* 4. *Crimes* verſus *Smith*, is not inconſiſtent with this poſition: and in *Bedle* verſus *Beard and others*, 12 *Co.* 5. there is nothing which confines the grant of the advowſon to a leſs recent date than the grant of the manor. But a ſtrong argument to ſhew the improbability of any ſuch grant having been in this caſe, ariſes from the abundant caution in this corporation to preſerve all their moſt antient deeds and records.

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For there are no leſs than three charters of confirmation in the reigns of *Hen.* 4. *Hen.* 5. and *Hen.* 6. immediately ſucceeding that of *Ric.* 2. beſides many others from *temp. Hen.* 8. to that of *Jac.* 2. all which it was totally unneceſſary to have preſerved; and yet the eſſential original charter is to be preſumed to be loſt in a caſe where the corporation itſelf never had an idea, much leſs any evidence of its having even exiſted. Under theſe circumſtances the non-production of it ought not to be ſupplied.

Second Point. The charter 5 *Ric.* 2. was not a grant of a port then exiſting; on the contrary, there was *no* port in the crown at all at that time. If there had been, no doubt but the grant of it would incidentally have carried the duties with it. But the words of this charter are clearly words of qualification; and at furtheſt grant only a liberty to the corporation to erect a port, viz. "*Conceſſimus quantum in nobis eſt quod ipſi et hæredes habeant portum in perpetuum annexum villæ, ita quod poſſint ædificare domos, kaias et ſtaiethas*," &c. If the king had at that time a port and the duties incident, the qualifying clauſe *quantum in nobis eſt* would have no meaning. *Habeant portum* is not the phraſe to expreſs an exiſtent port, nor would the ſubſequent words in that caſe have been neceſſary, but might have been all ſupplied by the ſingle expreſſion, *conceſſimus portum*. Further the ſubſequent words prove it was a thing *in fieri*; for there muſt have been quays and wharfs, if the port was then in being, and it muſt have been *annexed* to the town at that time. It is clearly therefore a grant of ſomething that was to be in future, not of a port actually erected at that time. The non-exiſtence of the port is further apparent from the ſilence of all the charters antecedent to the time of 5 *Ric.* 2. amongſt which are three that grant temporary tolls. 28 *Ed.* 1. 1 *Ed.* 3. 5 *Ed.* 3. But in the charter of *Ric.* 3. and ſubſequent grants, the mention of the port occurs frequently. Therefore on both grounds there ought to be a new trial.

Mr. *Lee*, on the ſame ſide contended, that this claim could not have a legal commencement if the port was a newly created port by charter 5 *Ric.* 2. becauſe the duties in ſuch caſe could not be in the crown but by act of parliament; and cited 2 *Vez.* 621. *Vaugh.* 159. *Shephard* verſus *Goſnold* and 12 *Co.* 34.

Lord *Mansfield*. The ground upon which an application for a new trial has been made in this caſe is, that there was no evidence of title in the plaintiffs to the port duties claimed by the action which ought to have been left to the conſideration of the jury; and if no title was made out which in point of law it

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fit for them to exerciſe their judgment upon, there ought to be a new trial.

There are two grounds upon which it is contended that there was ſufficient evidence of title in the plaintiff to be left to the jury.

Firſt. That there was an antient port of *Hull* in the king before the 5th of *Ric.* 2. with duties annexed to it, particularly thoſe in queſtion; which duties belonged to the king in right of the port. If ſuch a port and duties did exiſt in the king, it is not diſputed, nor can a doubt be made, but that he might grant them to a ſubject: and that they were granted is contended, from the general words of the charter confirmed by uſage. If this ground can be ſupported, there is an end of the motion for a new trial; becauſe the jury have had that left to them, which ought to have been left to them.

But *Secondly*, if that be not ſo, and if it is clear from the words of the charter 5 *Ric.* 2. that no port exiſted before, but that the *charter* itſelf *erected the port only*, without any duties; then it is contended, that between the 5 *Ric.* 2. and the year 1441, there might be ſome charter from the king, creating and giving theſe duties to the corporation, upon a ground which would ſupport them in point of law; namely, upon the conſideration of repairs, and the general advantage to be derived by the public, from its being properly kept up. This was the only point made at the trial, and the queſtion that ariſes upon it is, Whether upon the evidence, it was properly left to the jury to preſume ſuch grant between 1382 and 1441?

I lay out of the caſe that which might have been a foundation for a new trial; I mean the idea of new light to be got from the entries in the corporation books, becauſe there has been an inſpection, and therefore no ſurpriſe: and as to ſpoliation, the court cannot, upon a bare allegation, after inſpection had, go upon a ſurmiſe of that kind, eſpecially as ſince the trial no application has been made to ſee them.

With regard to the firſt point, that is, the conſtruction of the charter of *Ric.* 2. the caſe ſtands thus: It is proved by ſtrong evidence, that from the year 1441, down to the riſe of this queſtion, which comprehends a period of near 350 years, theſe duties have been exacted and ſubmitted to without ſuit or litigation. It likewiſe appears from a charter of the 13 *Car.* 2. which is above a century ago, that the corporation at that time made an application to the king, apprehending they had a title to theſe duties by virtue of a right immemorial, and the king upon their repreſentation confirms them thus: "Whereas

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" we are credibly informed, that within the ſaid town, *&c.* there " is an immemorial cuſtom that every merchant or other com- " ing into the water with ſhips and goods, *&c.* and unlading " the ſame within the port of the ſaid town, has been accuſ- " tomed to pay certain fees, *&c.* for the ſame, we will that " the ſaid cuſtom ſhall continue, and that the ſaid mayor and " burgeſſes ſhall enjoy the like fees, *&c.* as of time immemo- " rial for the ſupport of the great burthens and expences of the " ſaid mayor and burgeſſes in and about the reparation, preſer- " vation and defence of the ſaid port." There is a like charter of confirmation, *anno* 4 *Jac.* 2.

But it is ſaid theſe charters relate to port duties of *time immemorial*, and the corporation then built their right to them upon immemorial uſage; which cannot be; becauſe both the corporation itſelf, and the grant of the port by charter 5 *Ric.* 2. are within time of memory. But if at the time of the grant, the duties had exiſted immemorially in the king, the ſource of their claim is a preſcriptive right, and their title a derivative title to that which was in the crown from time immemorial, though they themſelves are a corporation within memory.

Then as to the conſtruction of the charter 5 *Ric.* 2. ſo far from thinking it clear, that the charter meant to *create* the port; if I was to determine that queſtion, I ſhould hold that the port *exiſted before.* The grant is, that they ſhall have " *portum* " *ſubtus eandem villam, dudum vocat. Sayercreek jam Hull.*" In the firſt place then conſider, what is a port? It is the water: the terms are ſynonymous; for the limits of the water make the port. *Secondly*, What is that which is deſcribed as having been *once* called *Sayercreek?* Upon the plain conſtruction of the words, it muſt be the *port* and not the town: for ſo early as the charter 27 *Ed.* 1. the town is deſcribed by the name of *Kingeſton ſuprâ Hull*, meaning the river *Hull*; it is therefore apparent from this charter, that the name of the port had before that time been changed from *Sayercreek* to *Hull*; and if never granted out of the hands of the crown till 5 *Ric.* 2. it clearly muſt have remained in him at that time. He grants that the *port* ſhall be for ever *annexed* to the *town*; which in my opinion ſtrengthens the conſtruction of its being an *ancient* port; by affording an inference, that before that time the corporation had only the benefit of it, whereas in future they were to be the owners and proprietors. But there are ſtill other words that ſupport this conſtruction; namely, that they ſhould have the port " *with-*

" *out*

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"*out the interpoſition of the king's officers or miniſters.*" This was a very material and neceſſary privilege, if the port had exiſted before, and the king's officers had been accuſtomed to collect the duties for the crown. But if it were a new erected port, the grant might have been conſidered as an abſolute excluſive grant. But admitting it to be *doubtful*, whether it was an *ancient* or a *new erected* port, the queſtion is a queſtion of fact; and, therefore, moſt proper to be left to the deciſion of a jury; who upon the evidence which in this caſe was the ſtrongeſt poſſible, namely, enjoyment for 350 years, have found in favour of the claim.

Before I proceed to the next ground, I ſhould obſerve that a queſtion was made, whether the grant could have a legal commencement? that is, ſuppoſing the charter 5 *Ric.* 2. to have *created* the port, and the duties to have been *incidentally* granted in conſideration of the repairs, whether ſuch grant would ſupport the claim? if the caſe turned upon that queſtion only, I ſhould take time to conſider of it, and to look into the caſes cited by Mr. *Lee.* But it ſeems to be taken for granted in the caſe of the *Mayor of Exeter* verſus *Trinlet*, *Trin.* 32 & 33 *Geo.* 2. *C. B.* and afterwards in the caſe of the *Mayor of Yarmouth* verſus *Eaton*, *Trin.* 3 *Geo.* 3. *B. R.* that ports are like markets with which the crown is entruſted, and that the king may grant the duties to a ſubject in conſideration of repairing the port.

The next ground is, the preſumption of a charter between 5 *Rich.* 2. 1382. and the year 1441.

Now with regard to admitting evidence to ſatisfy a jury that a charter did exiſt within time of memory which is not produced by record, my opinion is this; namely, *that all evidence is according to the ſubject-matter to which it is applied.* There is a great difference between *length of time* which operates as a *bar* to a claim, and that which is only uſed *by way of evidence.* A jury is concluded by length of time that operates as a bar: as, where the ſtatute of limitations is pleaded in bar to a debt; though the jury is ſatisfied that the debt is due and unpaid, it is ſtill a bar: So in the caſe of preſcription, if it be time out of mind, a jury is bound to conclude the right from that preſcription, if there could be a legal commencement of the right. But any written evidence ſhewing that there was a time when the preſcription did not exiſt, is an anſwer to a claim founded on preſcription. But length of time uſed merely by way of evidence,

evidence, may be left to the conſideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumſtances. For inſtance, there is no ſtatute of limitations that bars an action upon a bond; but there is a time when a jury may preſume the debt to be diſcharged: as where no intereſt appears to have been paid for ſixteen years. But if a witneſs is produced to prove the contrary, as by ſhewing the party not to have been in circumſtances to pay, or a recent acknowledgment of the debt, the jury muſt ſay the contrary. If a foundation can be laid that a record or a deed exiſted, and was afterwards loſt, it may be ſupplied by the next beſt evidence to be had, or if it cannot be ſhewn that it ever exiſted, yet enjoyment under a title which can only be by record, is ſtrong evidence to be left to a jury that it did once exiſt. I do not know an inſtance in which proof may not be ſupplied. Theſe are general rules, and it would be miſchievous, it it were to be laid down, that there can be no preſumption ſince the time of *Richard* I. to confirm a title by charter.

In Lord *Purbeck*'s caſe, the letters patent which were the only proper evidence of his title could not be found; and there was no proof of the record having been loſt: but he had ſat in parliament, had levied a fine of his honours to King *Charles* the Second, and I think enjoyed it to the time of his death. All the other facts were ſubſequent to the creation, yet the Houſe of Lords were of opinion in favour of the claim, and preſumed that the letters-patent had exiſted. Indeed, before the deciſion, the *bill* of the letters-patent was ſaid to be found at the *Privy Seal* office; but ſtill that was only preſumptive evidence; for the king might have recalled it before it paſſed the great ſeal.

But the caſe of *Bedle* verſus *Beard*, 12 *Co.* 5. determined by Lord Chancellor *Ellesmere* with the aſſiſtance of the judges upon deliberation, is a caſe in point, and of very great authority: and it is not liable to the diſtinction which Mr. *Dunning* endeavoured to make, becauſe there was no poſſibility of its being a grant within memory. The caſe ſtates, that in 31 *Ed.* 1. the king being ſeiſed of the manor of *Kimbolton*, to which the advowſon of *Kimbolton* was appendant, by letters-patent, granted the manor with the appurtenances to *H. de Bohun*, Earl of *Hereford* in tail general. *Humphrey de Bohun* the iſſue in tail in 40 *Ed.* 3. granted the advowſon to the Prior of *Stoneley* and his ſucceſſors, by which it became impropriate. The points were two, Whether

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ther the grant of the manor "*cum pertinentiis*" paſſed the advowſon? and adjudged that it could not: *Secondly*, Whether the grant by tenant in tail was not void? But upon this ſecond point, it was reſolved by Lord *Elleſmere* and the principal judges, that notwithſtanding the advowſon did not paſs by the grant of the king under the words "*cum pertinentiis*," and ſo the iſſue in tail had nothing in it at the time of this grant to the Prior; yet it ſhall now (4 *Jac.* 1.) be intended in reſpect of the ancient and continual poſſeſſion, that there was a lawful grant of the king to the ſaid *Humphrey*, ſo that he might lawfully grant to the ſaid priory. *For all ſhall be preſumed to have been ſolemnly done*, rather than that *ancient* grants ſhould be called in queſtion, which were *neceſſary* to the *perfection* of the thing, though the grant cannot now be ſhewn. And it was further obſerved in that caſe, that ancient poſſeſſion would injure inſtead of ſtrengthening a title, if after a ſucceſſion of ages and the deceaſe of parties, objections ſhould prevail which might have been anſwered in the life-time of the parties, and if well founded, would moſt probably have been ſooner made.

I remember, in general, though I cannot recollect the particulars of it, a caſe in the *Duchy-Court* between the King and Mr. *Brown* of *Snelbrook*. It was before the late *nullum tempus* bill. The evidence in ſupport of the title was, a poſſeſſion and enjoyment of 190 years; and I held that though ſuch poſſeſſion and enjoyment could not conclude as a poſitive bar, becauſe there was no ſtatute of limitation againſt the crown, yet it might operate as evidence againſt the crown of right in the defendant, if the claim could have a legal commencement; though ſuch commencement could not be ſhewn. In queſtions of this kind, poſſeſſion goes a great way: but there is no poſitive rule which ſays, that 150 years poſſeſſion, or any other length of time within memory is a ſufficient ground to preſume a charter. In the caſe of a ſuppoſed bye-law, uſage is allowed to ſupport it, without any proof of the exiſtence of ſuch a bye-law, or of the loſs of it. But the principle is a right one, namely, in favour of rights which parties have long been in the peaceable and quiet poſſeſſion of. I have myſelf taken it to be eſtabliſhed in point of law, that though the record be not produced, nor any proof adduced of its being loſt, yet under circumſtances it may be left to the conſideration of a jury, or of a court of equity, if the caſe comes properly before them, whether there is not a ſufficient ground to preſume a charter? Therefore, in the preſent caſe, taking it for granted

granted that ſuch charter would have given the plaintiff a title, I think it was properly left to the jury, Whether they would preſume ſuch grant? I am of opinion that the direction was proper on both points: but I ground myſelf chiefly upon the firſt; that is, that it was rightly left to the jury to ſay, Whether there was or was not an ancient port before and at the time of the charter 5 *Ric.* 2.? Indeed, I ſhould be loth to ſend the cauſe to a new trial, after an uſage of 350 years, even if the fact were much more doubtful. If, upon ſearch of the corporation-books, any new diſcovery ſhall be made that can throw light upon the ſubject, this verdict will be of no prejudice in a new action. Mr. Juſtice *Aſton*, Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* were of the ſame opinion. *Per Cur.* Let the rule for a new trial be diſcharged.

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REX *verſus* Inhabitants of HARTFORD.

Saturday, June 11th.

ERROR from a judgment of the quarter-ſeſſions upon a preſentment by a juſtice of peace, that from time whereof &c. there was, and yet is, a common highway leading from the town of *Witton* in the county of *Huntingdon*, to the village or town of *Hartford*, in the ſaid county, for all his majeſty's liege ſubjects to paſs and repaſs on foot *over a certain drain* or ditch *between* the ancient *incloſures* within the *pariſh* of *Witton* and the *town* of *Hartford*; but the ſame is broken and in ſuch decay that the ſaid ſubjects cannot paſs, &c. and that the inhabitants of the town of *Hartford* ought to repair, &c.

Mr. *Davenport* for the plaintiff in error objected, that the deſcription of this road is too uncertain; but particularly it is not laid to be *in* the pariſh of *Hartford* or in any *other* pariſh, but *over* a ditch *between* incloſures within the pariſh of *Witton* and the town of *Hartford*.

Lord *Manſfield*. It muſt be alleged to lie in the pariſh, otherwiſe the pariſh is not bound to repair, and, therefore, this preſentment is clearly bad. *Per Cur.*

Let the judgment be reverſed.

Monday, June 13th.

BAYLIS *verſus* LUCAS.

Judgment upon a writ of inquiry ſet aſide, becauſe the jury were returned by the attorney for the plaintiff.

UPON a rule to ſhew cauſe why the writ of inquiry executed in this caſe ſhould not be ſet aſide, exception was taken that the jury were returned by the attorney for the plaintiff.

Mr. Juſtice *Aſton*.—The rule muſt be made abſolute. Upon a motion for a new trial in a cauſe from the *Oxford* circuit in the year 1756, it was objected, that *Penoyer Watkins* who was under-ſheriff was attorney for the plaintiff, and that three of the jury were his own relations. The court ſaid, that every trial ought to be fair and indifferent: and, therefore, ordered the rule for a new trial to be made abſolute.

Mr. Juſtice *Aſhhurſt*. If the under-ſheriff is attorney in the cauſe and returns the jury, no doubt it is a good cauſe of challenge. *Per. Cur.*

Let the rule be made abſolute.

Same day.

FLOYER *verſus* EDWARDS.

One *ſells* goods at three months credit; but ſtipulates, in caſe the money is unpaid, that the vendee ſhall allow him a *half-penny* an ounce *per* month, till the debt is diſcharged. This allowance was according to an uſage in that particular branch of trade, but above the legal rate of intereſt. The contract being a *bonâ fide* SALE is *not* USURIOUS. Otherwiſe, if it had been merely *colourable*, to cover a LOAN and *evade* the ſtatute.

UPON a rule to ſhew cauſe why there ſhould not be a new trial in this caſe. Lord *Mansfield* read his report as follows:—This was an action brought againſt the defendant for goods ſold and delivered at three months credit, with an agreement, at the time of the ſale, that in caſe the money was not paid at the end of three months, then the defendant ſhould pay to the plaintiff an half-penny an ounce *per* month for ſo long a time as the money ſhould remain unpaid. At the trial it was proved that this allowance of an halfpenny an ounce *per* month as before ſtated, was the general uſage and practice of the trade, with one or two exceptions only; but upon calculation it appeared to exceed the legal rate of intereſt. Upon this, an objection was made to the plaintiff's right to recover, upon the ground of its being an uſurious contract, and meant only as a colour to avoid the ſtatute. But, his Lordſhip ſaid, I thought there ſeemed to be weight in the uſage of the trade, and in the circumſtance of it's being in the defendant's power to have avoided

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the additional payment of an halfpenny an ounce *per* month by discharging the principal sum at the time it became due: and the jury accordingly found for the plaintiff, as I wished, that the contract was not usurious. 1774. FLOYER *versus* EDWARDS.

Mr. *Dunning* moved for this rule upon two grounds. *First*, That though a loan is necessary to constitute an usurious contract, yet in a transaction like the present, the instant the limited credit is expired, from that moment, if the money remains unpaid, the condition of the parties is changed; for the buyer becomes a *borrower* and the seller a *lender*. *Secondly*, That it is not necessary to the creation of a loan, that money should be paid on the one hand, and received on the other; for the circumstance of a man's money remaining in another's hands, in consequence of an agreement made for that purpose, will equally constitute a loan. That no tradesman can recover interest upon non-payment at the day appointed, unless there be a special agreement for the purpose; and notwithstanding such special agreement, if it be usurious, as in the present case, it is as no agreement at all.

Lord *Mansfield* upon the motion said, he thought the second ground was the best to rest the question upon: for it either was, or was not, a contract within the mischief provided against by the statute. If the former, it was clearly an agreement for usury at the time of the sale; and therefore, like all other agreements whereupon or whereby more than legal interest is reserved, void: and the plaintiff of course not entitled to recover. But where a party takes more than legal interest, without any agreement at the time of the contract, there he is liable only to the penalty for the excess, and the contract remains good.

Mr. *Wallace* and Mr. *Bearcroft* shewed cause. This is no loan of money, but a communication for a *bonâ fide* sale of goods; and the circumstance of its being in the option of the party to pay the money without an increase of the price, removes every idea of its being usurious: for to make a contract usurious there must be a forbearance reserved in the contract itself, and so are the very words of the statute 12 *Ann. st.* 2. *c.* 16. "no one "shall take directly or indirectly for loan of money, *&c*, above "five pounds for the forbearance of 100*l per annum*." *Burton's* case 5 *Rep.* 69. *Mich.* 33 & 34 *Eliz. Roberts* versus *Tremaine*, *Cro. Jac.* 509. *Hawk. P. C.* 245. *sect.* 3. 248. *sect.* 19.

Mr. *Dunning* and Mr. *Buller contra*. The question is, whether it is lawful for a tradesman selling goods, to stipulate that

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if the price is not paid at a certain time, a greater ſum than legal intereſt ſhall be paid for the forbearance of it: and it is a queſtion of infinite magnitude in reſpect of trade in general.

This is not like the caſes cited, where a groſs ſum is ſtipulated *nomine pœnæ:* but it is the caſe of accumulating intereſt, incurring proportionably with the delay. In all thoſe caſes the lender may demand his money as ſoon as it is become due. But it is a fact and an ingredient of this bargain, that both parties looked to a day beyond the day of payment. For the plaintiff was not likely to call for his money when he could make 8 *per cent.* and the defendant upon ſuch an agreement was not likely to have money to pay at the day of ſtrict payment: therefore it is no anſwer to ſay, that he might have paid at the day: for the probability, not to ſay the poſſibility, of the caſe, was againſt his being able to do ſo: and the wiſdom of the laws againſt uſury conſiſts in the protection they ſhew to indigent men. As to the ſuppoſed cuſtom of the trade, the evidence is not ſufficient to create a cuſtom, for the traders are in number but five, and their practice not uniform; but if ſuch uſage did obtain in the trade, it is nevertheleſs void by the ſtatute, if uſurious in itſelf.

Lord *Mansfield.* The ſtatute 12 Queen *Ann. ſtat.* 2. *c.* 16. prohibits any body from taking any how on the loan of money above 5 *per cent* for the forbearance of payment; and all contracts for any loan of money, goods, merchandize, *&c.* bearing intereſt above 5 *per cent.* with an agreement for principal and intereſt, are null and void; but with regard to principal and intereſt, in caſe the agreement originally for the payment of principal be legal, and the intereſt does not exceed the legal rate; but afterwards upon payment being forborn, illegal intereſt is demanded, there the agreement by retroſpect is not void, but the parties are liable to the penalty of treble value.

This is a caſe on the original contract, by which the payment of the principal is ſtipulated; and therefore, if it is within the ſtatute of uſury at all, the contract itſelf is void. It depends principally upon the contract being a *loan:* and the ſtatute uſes the words "directly or indirectly."—Therefore in all queſtions in whatever reſpect repugnant to the ſtatute, we muſt get at the nature and ſubſtance of the tranſaction: the view of the parties muſt be aſcertained, to ſatisfy the court that there is a loan and borrowing; and that the ſubſtance was to borrow on the one part and to lend on the other: and where the real truth is a loan of money, the wit of man cannot find a ſhift to take it

out of the ſtatute. If the ſubſtance is a loan of money, nothing will protect the taking more than 5 *per cent.*; and though the ſtatute mentions only "for loan of moneys, wares, merchandizes, or other commodities;" yet any other contrivance, if the ſubſtance of it be a loan, will come under the word "indirectly." 1774. FLOYER *verſus* EDWARDS.

Let us examine then what the preſent contract is. It is ſaid the plaintiff is a lender: let us ſee where there is the colour of a loan in this caſe. The plaintiff is a refiner, and deals in gold and ſilver wire; ſo is the defendant: and, in the ordinary courſe of dealing, the one buys and the other ſells a quantity of this commodity on the terms and conditions before ſtated. There is no pretence of any negotiation for a *loan*, nor that one word paſſed about *borrowing* money; nor any evidence of an agreement to forbear paying the principal ſum, contrary to the true intent and meaning of the ſtatute. What are the terms of the contract? are they any newfangled terms? ſo far otherwiſe, that the agreement barely cannot be called an univerſal practice; yet it is the general practice of the trade. It is true the uſe of this practice will avail nothing, if meant as an evaſion of the ſtatute; for uſage certainly will not protect uſury. But it goes a great way to explain a tranſaction; and in this caſe is ſtrong evidence to ſhew that there was no intention to cover a loan of money. Upon a nice calculation it will be found that the practice of the Bank in diſcounting bills exceeds the rate of 5 *per cent*; for they take intereſt upon the whole ſum for the whole time the bills run, but pay only part of the money, *viz.* by deducting the intereſt firſt; yet this is not uſury. Here it appears that the whole agreement was made out firſt, the price of the goods fixed, and a limited credit given; but the party conſiders further, that perhaps punctual payment might not be made; and provides that in that caſe the buyer ſhall pay him ſo much more. This is no agreement for forbearance beyond the three months; the plaintiff might have brought his action inſtantly; and therefore, if not paid, was at liberty to ſay, that the buyer ſhould pay him a greater price. The authorities go ſtill further; and ſay, that wherever it is in the power of a known *borrower* of money to pay the principal within a limited time without intereſt; upon non-payment, the reſervation of a larger ſum than the ſtatute allows, is no uſury: becauſe uſury is an agreement originally to pay the principal with intereſt above the rate of 5 *per cent. Hawk. P. C. c.* 82. *ſect.* 19. I ſee no manner of difficulty to ariſe

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from it. I lay the foundation of the whole upon a man's going to borrow under colour of buying: there the contract is uſurious; but where it is a *bonâ fide* ſale, as in this caſe, it certainly is not. I have never had the leaſt doubt, either at the trial or ſince; and am of opinion as I was at that time, that the jury did right in finding that the contract was not uſurious. The three other judges concurred. *Per Cur.*

Let the rule for a new trial be diſcharged.

N. B. After the determination of this caſe, Alderman *Plumbe*, who was head of the Goldſmiths' Company, brought an action againſt *Carter*, one of the gold refiners, *for money had and received*, to recover the ſurplus ariſing from this allowance of an half-penny an ounce *per* month above the principal and legal intereſt. The action was tried at the Sittings in *London* after *Trinity* term 1775, before Lord *Mansfield*. The defendant had paid into court, the principal and intereſt at 5 *per cent.* and offered to pay coſts to the time of the action brought. Therefore the ſingle queſtion was, Whether the plaintiff could recover this ſurplus? Lord *Mansfield* was clearly of opinion that though the tranſaction itſelf did not amount to uſury, yet it was taking a hard and unconſcionable advantage; and therefore ſhould not be aſſiſted in an action for money had and received, which is an equitable action, and founded in conſcience under the particular circumſtances of each caſe. The jury found their verdict accordingly, and the plaintiff acquieſced without moving for a new trial.

Same day.

MELSOME *verſus* GARDNER.

One who is in cuſtody at the ſuit of the plaintiff in the *Marſhalſea Court*, cannot be removed by *habeas corpus ad reſpondendum* to anſwer to the plaintiff for the *ſame* debt in a new action in *B. R.*

THE queſtion in this caſe was, whether the plaintiff, who had arreſted the defendant in the *Marſhalſea* Court, and had him in cuſtody there, could, by a writ of *habeas corpus ad reſpondendum*, remove the body of the defendant into this court to anſwer to a new action here for the ſame debt. Mr. *Cowper* had moved to quaſh the writ. Mr. *Dunning* now ſhewed cauſe; and cited 2 *Lilly Prac. Regiſter*, *fol.* 2. "none "ought to take out a *habeas corpus* for a priſoner, without his "conſent, unleſs it be to turn him over to the *King's Bench*, "or to charge him with an action in court." *Vin. abr. tit. Habeas corpus*, *fol.* 240. "Where a perſon is in cuſtody in an "inferior juriſdiction, the plaintiff may bring his *habeas corpus* "returnable in this court; and then the defendant cannot "nonſuit the plaintiff, or be bailed but only by the court of "*R. B.*"

Mr.

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Mr. *Cowper contra.* A *habeas corpus* does not lie in this caſe. If it did, the original writs and bills of *Middleſex* in this court would be of little uſe. This is not the proper writ to remove a cauſe; but a *certiorari*: Suppoſe the defendant does not put in bail, the plaintiff can only have a *procedendo* to remove his own cauſe back again. The authorities cited do not apply: they only ſhew, that the plaintiff may have that kind of writ; but not to remove that particular ſuit.

Lord *Mansfield.* There does not appear to be any inſtance of it, and there ſeem to me to be ſtrong reaſons againſt it.

It was referred to the maſter to inquire into the practice of this and other courts.

Saturday, Nov. 26.

Afterwards, in *Michaelmas* term, the maſter reported, that there was no inſtance of it in *this* court: That in the court of *Common Pleas* ſome few ſuch writs had iſſued; but he underſtood from Mr. *Fothergill* the oldeſt ſecondary there, they had not been litigated; and ought not, in his opinion, to have iſſued. That in *London*, it is the practice for the plaintiff to be at liberty to remove the cauſe to the mayor's court, from the ſheriff's court; but that the *cuſtody* was *not changed*; the *plaint* only being removed by the *levatur*. He added, that the defendant might in the court below, by a ſummons, oblige the plaintiff below to proceed, or be non-proſſed with coſts; but if he was removed into the cuſtody of the marſhal he would have no method to compel the plaintiff to proceed here, or to obtain his coſts below. Whereupon the court ordered the rule for quaſhing the writ to be made abſolute.

HARMAN and others aſſignees of FORDYCE *verſus* FISHAR.

Tueſday, June 14th.

THIS was an action of *trover*, brought by the aſſignees of *Fordyce* againſt the defendant, to recover two promiſſory notes. At the trial a verdict was found for the plaintiffs, ſubject to the opinion of the court upon the following caſe.

A trader, in *contemplation* of *abſconding*, incloſes certain bills to *F.* a particular creditor, in diſcharge of his debt; ſaying, he has the honour to

That the defendant *Fiſhar* was a creditor of the partnerſhip of *Fordyce* and *Co.* and on various occaſions had done them many acts of friendſhip: and being already a creditor for 1,300 *l.*

ſhew him that preference which he conceives is his due. This is done without the privity of *F.* and followed by an act of bankruptcy before the notes could poſſibly be delivered. *Per. Cur.* The *eſſential motive* being to give a PREFERENCE and the *act* itſelf *incomplete*, is clearly *void*, though in favour of a very meritorious creditor.

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upon the 6th of *June* 1772, paid into the ſhop of *Fordyce* and *Co.* as bankers, the further ſum of 7000 *l.* and had it written in his book according to the uſual courſe; which ſum he had borrowed for the purpoſe of accommodating the ſhop during the holidays; and at the time the money was paid in, he ordered the perſon who paid it to tell them he ſhould not draw the money out before the *Friday* following, which they were told accordingly.

On the 9th of *June*, *Fordyce* ſet up all night ſettling his books and affairs in *contemplation* of *abſconding*; and being poſſeſſed in his own ſeparate right of the two notes deſcribed in the declaration, about five o'clock in the morning he incloſed them in a letter to Mr. *Fiſhar* as follows: to Mr. *Fiſhar*.— "Mr. *Fordyce* conceiving that the money lodged by Mr. *Fiſhar* "with his houſe on *Saturday* laſt, was a ſum, about which "perhaps even ſome pains have been taken to place it there, "he has the honour *to ſhew him that preference* which he con- "ceives is certainly his due."

5,500 *l.* *Collins* and *Co.* 3d *July*.
11,702 *l.* 18*s.* 4*d.* *T. Wm. Jolly*, 20th *June*.

That *Fordyce* delivered the letter and notes to Mr. *Harriſon* his clerk, with directions to carry them to Mr. *Fiſhar*'s office, and give them to him.—About ſix o'clock the ſame morning *Fordyce* abſconded and went to *France*.—At half an hour after eleven o'clock the ſame morning, a commiſſion of bankruptcy duly iſſued againſt him.—*Harriſon* about ten o'clock the ſame day called at the defendant's office: not finding him at home he returned again about twelve; but it being holiday time the office was ſhut up.—That, on *Thurſday* the 11th, *Harriſon* delivered the letter with the notes to Mr. *James* one of the partners of *Fordyce*, who ſent for the defendant; when Mr. *James*, in the preſence of the defendant and Mr. *Bellamy*, opened the ſaid letter and delivered it with the notes to the defendant; who having read the ſame to the company preſent, took them away with him: that they remain in his poſſeſſion, and that he refuſed to deliver them up. That *Fordyce* was indebted to the partnerſhip in a larger ſum than the amount of the notes in queſtion.

The queſtion for the opinion of the court upon this ſtate of the caſe was; "Whether the plaintiffs are entitled to recover "in this action?"

This

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This caſe was twice argued: firſt, in *Eaſter* term * by Mr. *Buller* for the plaintiffs and Mr. *Alleyne* for the defendant; and now in this term by Mr. *Lee* for the plaintiffs, and Mr. *Dunning* for the defendant.

* *April* 29th.

On the part of the plaintiffs it was inſiſted, that under the circumſtances of this caſe it was not competent to Mr. *Fordyce* to give this *preference* to the defendant. For, however, fair the tranſaction might be as between the parties; yet a trader, in contemplation of an act of bankruptcy, cannot give a preference to any particular perſon: becauſe, it is a fraud upon the reſt of the creditors, and againſt the general ſpirit of the bankrupt laws. This principle is fully ſettled and eſtabliſhed in the caſe of *Worſeley* v. *Demattos*, 1 *Bur.* 474. *et ſeq.* where the court held, that an aſſignment of all the bankrupt's effects, tho' a fair tranſaction between the parties, and for a good and valuable conſideration, was nevertheleſs fraudulent in reſpect of the other creditors: the object aimed at, being to give a preference which was unlawful.

The caſe of *Small* v. *Oudley*, cited in the caſe juſt mentioned, may be thought to be an authority the other way: but there no fraud was meant againſt the creditors: on the contrary, the court ſaid the whole tranſaction was beneficial to them; and the only perſon defrauded was *Small*. Beſides, the only point decided in that caſe was, that a deed cannot be fraudulent in equity which would not amount to an act of bankruptcy at law.

But the preſent caſe is clearly diſtinguiſhable from *Small* v. *Oudley*: For here the defendant knew the ſhop to be in a deſponding ſtate when he advanced the money: the repayment was voluntary, without the knowledge of the defendant, in the very moment of abſolute bankruptcy, and with a profeſſed view of giving an undue preference. An additional circumſtance is, that the notes were not delivered till after a clear act of bankruptcy was actually committed: For want, therefore, of the defendant's *aſſent*, the tranſaction was not complete, which alone is ſufficient to render the payment void. There are two caſes in which this objection made a principal ground in the determination the court gave. *Hague* v. *Rolleſton*, *Hil.* 8 *Geo.* 3. (ſince reported in 4 *Bur.* 2174) and *Alderſon* v. *Temple*, ſince reported likewiſe 4 *Bur.* 2238 *Paſch.* 8 *Geo.* 3. But the reaſoning and principles laid down in the latter caſe upon the queſtion of

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preference are deciſive of the preſent. Mr. *Buller* ſtated the opinion of the court at large, *quod vide.* 4 *Bur.* 2239.

This doctrine is confirmed and ſtrengthened by a caſe of very late date. *Linton* v. *Bartlett*, *Hil.* 10 *Geo.* 3. *C. B.* MSS.

The caſe was thus: The plaintiff's brother carried on his trade in two ſeparate ſhops, an upper and an under one: being indebted to his brother, upon the 3d of *Auguſt* he aſſigned over to him ſuch of his goods as were in his upper ſhop, being one third part only of his ſtock in trade: and this he did for the purpoſe of giving his brother a preference: the queſtion was, Whether this aſſignment was an act of bankruptcy? *Per curiam*, "This is a very plain caſe: the deed and the tranſaction may "have been very fair as between the parties; but in all theſe "caſes the object to be attended to is, *quo animo* the tranſac- "tion is done. Now the ſingle queſtion is, Whether a man "ſhall be allowed to commit a fraud upon the whole ſyſtem of "the laws concerning bankrupts, by giving a preference to one "creditor in prejudice to the reſt? clearly he ſhall not: and "here it being by deed, it is in itſelf an act of bankruptcy. "The great criterion is, Whether the act be done in contempla- "tion of becoming a bankrupt."

This is a deciſion expreſsly upon the point of preference in contemplation of bankruptcy; and no inconvenience can ariſe from fixing that as the moment when the curtain ſhould drop. Here it is expreſsly found that the notes were ſent in contemplation of committing an act of bankruptcy, and profeſſedly with a view to give the defendant a preference. The act, therefore, is void, and the plaintiffs well entitled to recover.

Mr. *Dunning* and Mr. *Alleyne* for the defendant.

Two queſtions ariſe in this caſe, *Firſt*, Whether it is competent in law for a trader, in contemplation of an act of bankruptcy, to give a preference under any circumſtances?

Secondly, If there be any caſe in which that preference may be given, Whether this is one of thoſe caſes?

With reſpect to the firſt, It has been ſettled that a trader at the eve of a bankruptcy may do every thing that he might have done at any period antecedent to that time: but it has never been eſtabliſhed that a trader ſhall at *no* time give a preference to a *bonâ fide* creditor. On the contrary, the caſe of *Small* v. *Oudley* 2 *P. Wms.* 427. is an authority expreſsly the other way. The circumſtances were very like the preſent. On the 21ſt of *September* 1720, *Small* to accomodate his friends *D.* and *J. Nor-*

court,

court transferred 500 *l.* *South-ſea* ſtock to them upon condition it ſhould be returned in ten days. Upon the 29th they made an aſſignment of *part* of their effects to *Small* as a ſecurity for transferring 500 *l.* *South-ſea* ſtock, reciting the truth of the caſe and the next day abſconded.—Sir *Joſeph Jekyl* was clearly of opinion that this aſſignment was good: "that there may be a juſt reaſon for a ſinking trader to give a preference to one creditor before another; to one that has been a faithful friend, and for a juſt debt lent to him in extremity; when the reſt of his debts might be due from him as a dealer in trade, wherein his creditors may have been gainers: whereas the other may not only be a juſt debt, but all that ſuch creditor has in the world to ſubſiſt upon: in this caſe, and ſo circumſtanced, the trader honeſtly may, nay ought to give a preference." He ſays further, "the time of the aſſignment is not material, provided it be before the bankruptcy: but the juſtneſs of the debt is very material; and the circumſtance of the non-privity of the creditor to the aſſignment was very much in his favour."

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It is plain, therefore, from this caſe, that antecedent to an act of bankruptcy actually committed, there may exiſt a caſe in which by law it is permitted to a trader to give a preference. The obſervation made by Lord *Mansfield* upon this caſe of *Small* v. *Oudley* in the deciſion of *Worſeley* v. *De Mattos* tends to explain that the ground of the opinion was right. For, his Lordſhip ſaid, "this caſe was very particular: the fraud was upon *Small*, and not upon the creditors: His ſtock was to be replaced in a week or ten days at furtheſt: 1,800 *l.* of *Small*'s money went to the creditors, and this ſecurity amounted but to 300 *l.* So that the whole tranſaction was beneficial to the creditors." Now every ſyllable and every circumſtance upon which Sir *Joſeph Jekyl* founded his opinion in that caſe, is not only applicable to, but actually to be found in the preſent.

The caſe of *Linton* v. *Bartlett* is inapplicable to this caſe: for the ground of that deciſion was that the aſſignment was an act of bankruptcy itſelf, and, being of *all* the goods in *that* ſhop, was within the ſame miſchief as if it had been an aſſignment of the goods in *both*. It has been inſiſted that no inconvenience can ariſe if the line were to be drawn at the beginning of an inſolvency. That is not ſo; for then all the creditors ſubſequent to the time when the court determines that the line of diſtribution ſhould be drawn, muſt be involved in the wreck. The contemplation of becoming bankrupt, is equally difficult to aſcertain:

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certain: but neither the point of inſolvency nor the reſolution to become bankrupt is the period of bankruptcy; nor can the contemplation of bankruptcy be the true line to be drawn: for each is ſo indefinite and uncertain, that the rule in either caſe would tend to endleſs litigation. It were to be wiſhed, therefore, that the court would ſettle the rule of preference according to the honeſty or diſhoneſty of the tranſaction.

In *Alderſon* v. *Temple*, Mr. Juſtice *Yates* ſaid, there is no doubt but that an act of this ſort may be done on the eve of a bankruptcy under fair and honeſt circumſtances; and that in *Small* v. *Oudley* the juſtice of the caſe required it. With reſpect to the act being incomplete for want of the defendant's aſſent, in *Atkins* v. *Barwick*, 1 *Str.* 165. the aſſent was ſubſequent to the act of bankruptcy: and the only queſtion was, Whether a ſubſequent diſſent was neceſſary to deveſt the property.—The court held, that delivery veſts property unleſs deveſted by a ſubſequent diſſent: and if founded upon good conſideration is not countermandable. Here the delivery was unqueſtionably upon good conſideration; and, therefore, as to the point of non-privity and aſſent, the authority is deciſive.

The ſecond queſtion is, Whether this is a caſe in which a preference may be given? And this, we have ſeen, depends upon the honeſty of the tranſaction.

Now, the purpoſe for which Mr. *Fiſhar* advanced this money was meritorious and friendly in the higheſt degree: the uſe to which Mr. *Fordyce* applied it, namely, to leſſen the partnerſhip debt, was juſt and honeſt: but his diſtreſſes were ſuch as defeated the object, and, therefore, what could be more fair, what more reaſonable, what more diſtant from fraud than to return it. When returned, the creditors were preciſely in the ſame ſituation as they would have been in, if it had never been advanced: and no doubt in itſelf the loan of the money was as friendly and in its conſequences might have been as beneficial to them as it was intended to be to Mr. *Fordyce*.

Lord MANSFIELD, after ſtating the caſe delivered his opinion as follows:

The defendant Mr. *Fiſhar* is certainly a very meritorious creditor of Mr. *Fordyce*; and in this laſt tranſaction did him a very great act of friendſhip. I have, therefore, been very ſorry, as far as one can be ſaid to be ſorry in the adminiſtration of juſtice, that I could not ſee in this caſe any circumſtances which could give riſe to a queſtion: for they are ſo very particular as not to lay the leaſt foundation for one.

The

The queſtion is, "Whether the plaintiffs are entitled to recover in this action?" which depends on this: Whether the property of the two notes was duly and regularly transferred before the act of bankruptcy? I ſay duly and regularly, becauſe that excludes fraud.

Legal preference is where the property is *duly* and *regularly* transferred;

There has been much argument upon a general queſtion, "Whether a trader in contemplation of an act of bankruptcy "can give a preference to a *bonâ fide* creditor?" Perhaps the ſtating it as a general queſtion involves a great impropriety: becauſe no trader can do an act of fraud, contrary to the ſpirit of the bankrupt laws, and to the injury of his creditors. He cannot aſſign his effects to all his *other* creditors in excluſion of one whom he thinks diſhoneſt or unjuſt: nor even to be equally divided amongſt all his creditors; becauſe he cannot take his eſtate out of that management which the law puts it into. If any act of this ſort is done by deed, it is not only void, but in itſelf an act of bankruptcy from the date of the deed. If without deed, it is void in reſpect of thoſe whom it prejudices.

But all queſtions of preference turn upon the action being complete before an act of bankruptcy committed: for then the property is transferred: otherwiſe, an act of bankruptcy intervening veſts the property in the hands and diſpoſal of the law.

and the *transfer* itſelf *complete before* an act of *bankruptcy*.

In the caſe of *Worſeley* v. *De Mattos*, whatever the court might think of the caſe of *Small* v. *Oudley*, there was no intention to lay it down that the determination of that caſe was wrong at that time. But no caſe ever came before us where we were warranted to ſay, that no caſe can exiſt of a legal preference. For if a man were to make a payment but the evening before he becomes bankrupt, independent of the act of parliament and in a courſe of dealing and trade, it would be good: or ſuppoſe legal diligence uſed by a creditor, and an execution or *ca. ſa.* is in the houſe, and under terror of that he makes an aſſignment and delivery of his effects, it would be valid; the object not being to give a preference, but to deliver himſelf.—In *Cock* v. *Goodfellow* the act done was fair: it was done ſeveral months previous to the act of bankruptcy, and was no more than what the court of Chancery would have compelled the party to do. Where an act is done that is right to be done, and the ſingle motive is not to give an unjuſt preference, the creditor will have a preference.

As where a payment is made by a trader, in the *ordinary courſe of dealing*, or *enforced by* legal *proceſs*, though but the evening before he becomes bankrupt.

In *Small* v. *Oudley* upon a *Stipulation* to replace ſo much ſtock the *day* agreed upon was *paſt*; the eſtate had had the benefit of the

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the ſolemn agreement, and the bankrupts gave a ſecurity for part of the debt only: a diſtinction was likewiſe taken becauſe the ſecurity was upon their effects in a ſeparate trade. That was a very favourable caſe: but I think it extremely ſhaken by the caſe of *Linton* v. *Bartlett* in the *Common Pleas*, which goes further than any other: For that caſe has determined that though the act be complete, yet if the mere and ſole motive of the trader was to give a preference, it ſhall be void; and if by deed, is in itſelf an act of bankruptcy. In that caſe the money was advanced by the brother from motives of friendſhip and without intereſt. Poſſeſſion of the goods was delivered inſtantly upon the aſſignment being made; and a clear act of ownerſhip exerciſed by the brother, by his expoſing them to ſale, and carrying on the trade: nor had he the leaſt knowledge or ſuſpicion of the inſolvency. But the material circumſtances which made that a fraudulent act, are theſe: The brother did not arreſt, or threaten, or even call upon the bankrupt for the money: But the bankrupt of his own *voluntary* act gave him the aſſignment. With what intent? Why, to give him a preference. The goods aſſigned were not more than one-third of his effects. Upon what then was the opinion of the court founded? Not upon one-third being the ſame as an aſſignment of all his effects; but upon the trader's giving a preference; and upon his ſole motive being to do ſo. If he can give it to one, he can give it to another; which would eſtabliſh this principle, that a bankrupt may apportion his eſtate amongſt his different creditors as he thinks proper. That caſe goes further than any former deciſion. It had before been held in *Worſeley* v. *De Mattos* that an aſſignment of *all* was a clear act of bankruptcy, and an exception of *part*, if colourable or fraudulent, will not take it out of the general rule.

But the preſent caſe affords no circumſtances that can give riſe to a queſtion. A trader at five o'clock in the morning, juſt going to commit an act of bankruptcy, orders his ſervant to take certain bills to a creditor in diſcharge of a debt: purſuant to no *contract*: in performance of no obligation; in no courſe of dealing; without the privity of the creditor, or call on his part for the money, and without a poſſibility of the notes being delivered before an act of bankruptcy was committed. This is an order how his effects ſhall be apportioned after his bankruptcy He delivers the letter to his own ſervant, and might have countermanded it: here it falls in with the caſe of *Temple* v. *Alder-*

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ſon, and *Hague* v. *Rolleſton*: The act was not complete; and therefore the act of bankruptcy revoked it. Suppoſe the drawers had been inſolvent, was Mr. *Fiſhar* bound to take the notes in ſatisfaction of his debt? Beſides, the amount of the notes exceeded the debt by ſeveral hundred pounds. But what is the nature of the tranſaction upon the face of the letter? It is in terms a declaration that he means to give a *preference*. This the law does not allow: and if it had been by deed it would itſelf have been an act of bankruptcy. But it is much ſtronger where the trader mentions that to be his *ſole* motive; and where the act cannot be completed till after an act of bankruptcy actually committed.

The three other judges were of the ſame opinion.

Lord *Mansfield* added, that if a preference were only conſequential, the caſe might be different: as if a payment were made or an act done in purſuance of a prior agreement. His Lordſhip further obſerved that with reſpect to the caſe of *Atkyns* v. *Earwick*, 1 *Strange* 165. the judgment ſeemed to be right, but the reaſons wrong. The true ground was, that the trader very honeſtly *refuſed* to *accept* the goods, and *returned* them.

HUGHES *verſus* RICHMAN.

Same day.

IN covenant the plaintiff declared as aſſignee of one *Clarke*, for that the defendant, under an indenture of leaſe from the ſaid *Clarke*, had covenanted, *inter alia*, "that he the ſaid *John* "*Richman* would permit and ſuffer the ſaid *Joſiah Clarke*, his "heirs, nominees, and aſſigns, or his or their next tenant or "tenants, to enter into and upon all or any part of the demiſed "premiſes, which in the laſt year of the ſaid demiſe ſhould be "ſown with barley or oats, and then and there to ſow along with "the barley and oats of the ſaid *John*, ſo much clover and "graſs ſeeds in ſuch manner as the ſaid *Clarke*, his heirs, *&c.* "ſhould think fit." The breach aſſigned was, "that the de-"fendant in the laſt year of the term, did *ſow* twenty acres "with *barley*, and twenty acres with oats, *without giving notice* "to the plaintiff; by which he was prevented from ſowing "the clover and graſs ſeeds." The defendant pleaded, "that "he did not *prevent* the plaintiff from ſowing as much clover "and graſs ſeeds as he thought fit and convenient." The plaintiff demurred, and aſſigned for ſpecial cauſes of demurrer, 1ſt, That defendant

COVENANT "to "permit the "plaintiff in "the laſt "year of the "term to ſow "clover "among de-"fendant's "barley." BREACH ASSIGNED was, that the defendant ſowed, *&c. without giving* the plaintiff *notice.* PLEA, that the defendant did *not prevent*, and upon demurrer adjudged a good plea.

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the defendant by his plea had put in iſſue a matter of *inference* from the fact before alleged. 2dly, That he had offered to put in iſſue a matter not properly iſſuable. 3dly. He had not by his plea denied, confeſſed, or avoided the ſubſtantial matter.

Mr. *Baldwin* for the plaintiff. Covenants depend ſo much upon the nature of the particular contract that there is no caſe in point; but I contend that the defendant ought to have given notice to the plaintiff before he ſowed the land with barley and oats, in order that he might ſow graſs ſeed at the ſame time agreeably to the terms of the covenant: for it is a general rule, that wherever the matter lies more in the conuſance of one party than of another, ſuch party ought to give the other notice. *Hardres* 42. Here the plaintiff could not be appriſed of the intention of the defendant to ſow, or even of the fact of his having ſown barley and oats, without previous notice; and therefore it was incumbent upon him to give ſuch notice.

Mr. *Buller* for the defendant. The plea is good in ſubſtance and in form. For 1ſt. In a declaration in covenant, the breach may be aſſigned as generally as the covenant, even though it amount to a negative pregnant. *Cro. Jac.* 170-304. 3 *Mod.* 69. 2dly. The defendant need not be more particular in his plea, than the plaintiff in his declaration, and he may elect to purſue either the words of the breach aſſigned, or the words of the covenant itſelf. If he anſwer the former, it is ſufficient, becauſe then there can be no cauſe of action; if the latter, it is an anſwer to all the charge alleged. Here the covenant is, "to permit and ſuffer," and the breach aſſigned is, "that the defendant prevented by not giving notice." The plea is, "that he did not prevent the plaintiff from ſowing "the graſs ſeed." The queſtion is, Whether notice is neceſſary? I contend it was not; for it is not a general rule that where things lie more in the knowledge of one party than of the other, that that perſon is bound to give notice. On the contrary, if there had been an expreſs covenant in this caſe, on the part of the plaintiff to ſow clover, *&c.* when the defendant ſowed barley, *&c.* it would have been incumbent on the plaintiff to have taken notice at his peril, when the defendant ſowed barley. If he is not bound, therefore, to give notice, where the omitting to do ſo would create a breach in the plaintiff, much leſs is he obliged where it is to excuſe a breach on his own part. *Cro. Jac.* 102. *Bulſtrode* 254-5. *Jenkins* 337. *Cro. Jac.* 475. 1 *Roll. Abr.* 464.

Again,

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Again, this covenant is merely negative and paſſive; and therefore to conſtitute a breach ſome act muſt be done: a non-feazance only is not ſufficient. 1. *Roll. Abr.* 425. *pl.* 45. 1 *Roll.* 430. *pl.* 16. 3 *Leon.* 38. *Laſtly*, If a breach at all, it is a conſtructive breach: for admitting it to have been in the intention of the parties that notice ſhould be given, yet no notice is expreſſed in terms which it ought to have been. It is therefore *caſus omiſſus* in the covenant, which the court will not ſupply. *Sty.* 12.

Lord *Mansfield.* Stript of the authorities that have been cited, this is a very plain caſe. The covenant makes no mention at all about any notice to be given. The breach aſſigned is, the not permitting the plaintiff to ſow graſs ſeed. The ſingle queſtion is, whether the defendant did or did not prevent him? If he had refuſed to give notice, or had given a wrong notice, it might have been a breach: but here it appears that he has done nothing to prevent him or the contrary. Therefore there can be no breach.

Willes Juſtice concurred. *Aſhhurſt* Juſtice—The plaintiff is the party for whoſe benefit the covenant was intended; therefore he ought to have uſed due diligence. *Per Curiam*,

Judgment for the defendant.

MARDER *verſus* COX.

Wedneſday, June 15th.

Coſts of ſuit on a rule of reference, are *common* coſts. *Vide S. P.* determined this ſame term in *C. B.* in the caſe of *Barker* v. *Timſon.* 2. *Blackſtone Rep.* 953.

BY an order of *Niſi Prius* referring this caſe to arbitration, it was ordered, "that all matters in difference between "the parties, together with the coſts of this action and refer-"ence, be referred to the award of, *&c.*" The arbitrator as to the coſts awarded as follows: "That the defendant ſhall "pay to the plaintiff his full coſts and charges of this action "ſuch coſts to be taxed as between *attorney* and *client* by the "proper officer, *&c.*"

Mr. *Dunning* moved to ſet aſide this award, becauſe the arbitrator had exceeded his power in directing the coſts to be paid as between attorney and client: for the intent of the reference was merely to put the party who ſhould be thought right, in the ſame ſituation as if he had had a verdict; in which caſe he could only have received coſts taxed in the ordinary courſe between party and party.

Upon

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Upon ſhewing cauſe, the court held the award wrong upon this objection; for the words of the reference clearly meant coſts in a technical ſenſe, which are *legal* coſts: but as to *coſts* they held it good; and therefore ordered, * that ſo much of the award as directed the maſter to tax the coſts as between attorney and client, ſhould be ſet aſide, and the reſt ſhould ſtand.

*In *Barker* v. *Tomſon* there was the like rule: But the motion in that caſe was only to ſet aſide *ſo much* of the award as directed the coſts to be paid as between attorney and client.

Same day.

Anonymous.

UPON a rule to ſhew cauſe why the proceedings in this ejectment ſhould not be ſtaid till a ſufficient plaintiff was found, the leſſor of the plaintiff being an infant; Mr. *Morgan* ſhewed for cauſe, that no application had been made to know if there was a real and ſubſtantial plaintiff; and it being ſtated by affidavit that the guardian had undertaken to pay the coſts, if the ſuit ſhould be determined againſt the infant, the court diſcharged the rule with coſts.

Thurſday, June 16th.

Anonymous.

In an action upon the judgment though for *above* 10*l.* the defendant ſhall not be held to *ſpecial bail*, if the *original* demand was *under* that ſum.

UPON a rule to ſhew cauſe why upon filing common bail a *ſuperſedeas* ſhould not iſſue as to this action to diſcharge the defendant out of gaol; Mr. *Cowper* ſhewed for cauſe that though the debt was originally under 10*l.* yet after judgment obtained, and *coſts* taxed, the whole ſum amounted to 17*l.*; and that upon a writ of execution being ſued out, the defendant, in conſideration that the plaintiff would ſtay the execution at that time, undertook and promiſed to pay the debt and coſts. That ſeveral applications had been ſince made to the defendant for payment without effect, and, therefore, he was now held to bail upon his new *aſſumpſit* for the 17*l.*

Willes Juſtice mentioned the caſe of *Palmer* v. *Nedham* 3 *Burr.* 1389. where the plaintiff, whoſe original demand was only 3*l.* 13*s.* 6*d.* having obtained judgment, brought an action of debt thereupon for the debt and coſts, amounting in the whole to above 10*l.* and held the defendant to ſpecial bail. But upon ſhewing cauſe why *common* bail ſhould not be accepted, and the bail-piece diſcharged, the court ordered it accordingly.

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Lord MANSFIELD. This is a new ſpecies of action, and an attempt to turn a judgment debt into a debt upon ſimple contract. If the undertaking had been by a third perſon in conſequence of the forbearance, it would have been a good ground of *aſſumpſit* againſt ſuch third perſon. But here the promiſe is by the defendant himſelf to pay a debt to which he was before liable upon record: for by the judgment he is liable to the coſts as well as to the debt. And, therefore, I am of opinion that ſuch promiſe is no ground upon which to raiſe an *aſſumpſit*.

Promiſe by the *defendant* to pay a judgment debt obtained againſt him in conſideration that the plaintiff would ſtay execution thereon, is no ground to raiſe an *aſſumpſit*. Otherwiſe, if the promiſe be by a third perſon.

Aſhburſt Juſtice. I am of the ſame opinion. This promiſe is no waiver or extinguiſhment of the judgment debt; but it ſtill remains a lien upon the land.

Rule made abſolute.

DOE on the demiſe of ROGERS *verſus* MEARS.

Friday, June 17th.

IN ejectment brought to recover two rectories, upon a caſe reſerved for the opinion of the court, the facts were as follow. "That upon the 9th of *May*, 1766, the rector, in "purſuance of an agreement, and in conſideration of 360 *l.* demiſed the rectories in queſtion to the leſſor of the plaintiff "for 99 years, if the rector ſhould ſo long live, for the purpoſe "of ſecuring to the leſſor of the plaintiff an annuity of 60 *l.* "*per annum*, with a power of entry, and likewiſe a power of "diſtreſs and ſequeſtration if the annuity were in arrear. "That the annuity was in arrear, that the rector abſconded in "*December* 1770, and had not been reſident ſince." No witneſs was called on the part of the defendant, but it was admitted that he was in poſſeſſion under a ſequeſtration. A verdict was found for the plaintiff, ſubject to the opinion of the court upon the following queſtion; "Whether the deed and the leaſe "under which the plaintiff made his title was void by the ſtatute "13 *El. c.* 20?"

A ſequeſtration upon a *fi. fa.* of a benefice with cure, is no excuſe for the non-reſidence of the incumbent: and a leaſe thereof made by him, is, on account of ſuch abſence, void by the ſtat. 13 *Eliz. c.* 20. *ſect.* 1.

Mr. *Whitchurch* for the plaintiff. The object of the ſtat. 13 *Eliz.* c. 20. was to prevent the corrupt transfer of eccleſiaſtical benefices only: and being a penal ſtatute ought to be conſtrued ſtrictly. But here no proof is ſtated of any corrupt agreement, therefore it is not within the penalty of the ſtatute. —2dly, The abſconding in this caſe is not an abſence within the purview of the ſtatute, which clearly meant a *voluntary* and wilful

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non-reſidence, not a compulſory abſence as in this caſe, in conſequence of the defendant's ſequeſtration. The words of the ſtat. 21 *H.* 8. *c.* 13. *ſect.* 26. againſt non-reſidence and the caſes decided upon it ſupport this conſtruction, "every ſpiritual perſon "*&c.* who ſhall *wilfully* abſent himſelf." *Moore* 448. 6 *Rep.* 21. *b.*

Mr. *Murphy* for the plaintiff cited *Bunb.* 210, 211.

Lord MANSFIELD. This is a very clear caſe. A ſequeſtration under a *fieri facias* is no impediment or prevention to the ſerving a cure; and therefore the non-reſidence is a clear avoidance of the leaſe. *Per curiam.* Let a nonſuit be entered and the poſtea be delivered to the defendant.

Same day.

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One, having made his will, and deviſed *all* his freehold and *copyhold* lands to a *number of uſes*, afterwards purchaſes *other copyhold* lands which he ſurrenders thus: "*To the uſes* "DECLARED *or to* "*be declared* "*in and by* "*his laſt* "*will and* "*teſta-*"*ment.*" This amounts to a *republication*; and the *newly purchaſed copyhold lands* ſhall paſs to the ſame uſes as the teſtator's copyhold lands deviſed by his will.

THIS was a caſe from Chancery for the opinion of this court, in ſubſtance as follows:

That *John Heylyn* being ſeiſed in fee of certain *freehold* lands called *Hanchet-Hall*, part thereof ſituate in the county of *Eſſex*, and other part thereof in the county of *Cambridge*, and being likewiſe ſeiſed of certain other lands called *Higgons*, partly *freehold* and partly *copyhold* in the county of *Eſſex*, duly made and publiſhed his laſt will bearing date the 13*th of March* 1732, and thereby deviſed ALL his meſſuages, lands, tenements and hereditaments, as well freehold as copyhold, ſituate, lying and being in the counties of *Suffolk*, *Eſſex*, and *Cambridge*, or either of them, to *Suſannah Helen* his wife for life; and after her deceaſe to a number of uſes: and deviſed All the reſt and reſidue of his real and perſonal eſtate to his wife, her heirs, executors and adminiſtrators, and appointed her his ſole executrix.

That the teſtator at the time of making his will was mortgagee out of poſſeſſion of three fifth parts of certain copyhold premiſes holden of the manor of *Heddingham Upland* in the county of *Eſſex*, which he afterwards purchaſed and was admitted to on the 20th of *October* 1735, and in the ſame year purchaſed one other fifth part of the ſame premiſes; all of which he ſurrendered thus: "To the *uſes*, intents and purpoſes, *declared* "or to be declared in and by his laſt will and teſtament."

In the year 1736, the teſtator directed a 50*l.* legacy to be ſtruck out of his will, and ſubſcribed the following memorandum in the preſence of two witneſſes: *September* 31ſt 1736. "The 50*l.* "legacy to the poor of the pariſh of *Wrexham*, ſcratched out as "above, was done in his preſence and by his immediate order, he

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"having paid it himſelf." That in the year 1737, the teſtator *John Heylyn* died ſeiſed of the ſaid lands called *Hanchet-Hall* and *Higgons*, and alſo of the four fifth parts of the ſaid copyhold lands holden of the manor of *Heddingham Upland* in the county of *Eſſex*, without revoking or altering his ſaid will, or making any codicil thereto, except the codicil or teſtamentary declaration above-mentioned.

The queſtion ſtated for the opinion of the court was, "Whether the copyhold lands to which the teſtator *John Heylyn* was "admitted the 20th of *October* 1735, and ſurrendered to the "uſe of his will, or any part thereof, were ſubject to any of the "uſes mentioned in his will dated the 13th day of *March* 1732, "and which of them?"

Mr. *Mansfield* for the plaintiff. The copyhold lands did not paſs by this will. 1ſt. Becauſe no after purchaſed lands can paſs by a will already made, however general or extenſive the words of ſuch will may be. 1 *Salk.* 237. *Den* on the demiſe of *Harris* v. *Cutler*, *Tr.* 10 *Geo.* 3. *B. R.* 2dly, They clearly cannot paſs by the expreſſions uſed in this will and ſurrender; becauſe the ſurrender is merely in the common form, to the uſes declared or to be declared, *&c.* But no uſes were declared of theſe lands at the time of their being purchaſed, nor is there any thing in the ſurrender which diſtinguiſhes to which of the uſes in the will they ſhould operate; conſequently they deſcend to the heir at law as being undiſpoſed of.

Mr. *Dunning contra.* The copyhold lands in queſtion did paſs by this will. The terms of this ſurrender are framed ſo as to relate either to a will in being, or to any future will the teſtator might be ſuppoſed to make. But the rule as laid down reſpecting after-purchaſed lands is not univerſally true; for if a man purchaſe freehold or copyhold lands, and by any diſpoſition he may chuſe to make of them recognizes an intention expreſſed in a former inſtrument, ſuch recognition will guide the diſpoſal of them. The caſe of *Harris* v. *Cutler* is in favour of the defendants. For there Lord *Mansfield* ſaid, that a ſurrender of lands after-purchaſed might be ſo penned as to refer to a diſpoſition already made: and the ground of the deciſion was, that the words of ſurrender were to ſuch uſes as *I. S.* ſhall declare, *&c.* Here the ſurrender is ſo penned as to relate to the will of 1732, for it is to the uſes declared, *&c.* But if it were doubtful, the circumſtance of eraſing the legacy of 50*l.* which was ſubſequent to the ſurrender, in itſelf amounts to a republication of the will: for it is ſtrong evidence to ſhew that

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he meant the reſt of his will ſhould remain good, and the ſlighteſt proof is ſufficient to make a republication, which is always favoured in law. 1 *Vern.* 330. 1 *Roll. Abr.* 617.

Lord MANSFIELD. I never had the leaſt particle of doubt in this caſe: the ſtating the nature of a republication will go a great way in the conſtruction of this ſurrender. When a man republiſhes his will, the effect is, that the terms and words of the will ſhould be conſtrued to ſpeak with regard to the property he is ſeiſed of at the date of the republication, juſt the ſame as if he had had ſuch additional property at the time of making his will. Therefore, if one deviſes lands by the name of *B. C.* and *D.* and purchaſes new lands and republiſhes his will; the republication does not concern ſuch new lands, becauſe the will ſpeaks only of the particular lands *B. C.* and *D.* But if the teſtator in his will ſays, I give *all* my real eſtate, a republication will affect ſuch newly purchaſed lands, becauſe it is then the ſame as if the teſtator had made a new will. Apply this rule to the caſe of a ſurrender, and I am of opinion that the ſurrenderor may expreſs himſelf ſo as to make it relate to a will actually made; and that the copyhold lands ſo ſurrendered will paſs by it. Suppoſe a teſtator ſeiſed of copyhold lands makes his will without a ſurrender; if he afterwards ſurrender them to the uſe of his will, ſuch ſurrender will clearly make his will good, and is effectual to paſs them: becauſe it only obviates the mode and form of conveyance.

What has the teſtator done here? having made his will and declared his lands to uſes, he ſurrenders his newly purchaſed copyhold lands, to the uſes, intents and purpoſes, declared or to be declared in his will; it is preciſely the ſame thing as if he had ſaid, and whereas I have made a will ſo and ſo, and deviſed all my lands to *I. S.* to ſuch and ſuch uſes, I mean theſe newly purchaſed lands ſhould paſs to the ſame uſes. I cannot poſſibly make a doubt as to the conſtruction: and there was no occaſion to ſtrike out the legacy of 50 *l.* unleſs he intended that particular part of his will ſhould be cancelled, and the reſt ſtand.

Lord MANSFIELD added,—I ſhould have obſerved upon the inaccuracy of reporters, who are very apt to ſay that a thing is ſo and ſo in *Equity*. Now there is no republication in equity that is not ſo in law. But the expreſſion *in equity* is very likely to miſlead ſtudents, and make them imagine there is a diſtinction.

The court certified their opinion to the court of Chancery as follows:

Having heard counſel on both ſides and conſidered this caſe, we are of opinion that the ſurrender of *John Heylyn* the grandfather, bearing date 20th *October* 1735, does, by expreſs reference to the uſes declared by his will, adopt and apply the words of the will to theſe copyhold lands, as if the teſtator had been ſeiſed thereof at the time of making the ſaid will; and, therefore, they are ſubject to the ſame uſes to which all the teſtator's copyhold lands in the county of *Eſſex* are deviſed by his will. 1774. HEYLYN *verſus* HEYLYN.

RIDOUT and Another, Aſſignees, *verſus* BROUGH.

IN *aſſumpſit* the declaration conſiſted of five counts. 1ſt, For money had and received by the defendant *ſince* the bankruptcy to the uſe of the aſſignees. The 2d, 3d, and 4th were for money paid, *&c.* money lent, *&c.* and work and labour done by the *bankrupt before* the bankruptcy and *aſſumpſit* to the *aſſignees*. 5th. An account ſtated with the plaintiffs of money due to them *as aſſignees*. The Statutes of ſet-off extend to aſſignees under a commiſſion of bankruptcy.

The defendant pleaded. 1ſt, *Non aſſumpſit*, on which iſſue was joined. 2d, A plea of ſet-off of 869 *l.* to the *whole* declaration, for a judgment obtained againſt the bankrupt for money lent and advanced, money had and received, *before* the bankruptcy. 3d, Another plea of ſet-off for money lent and advanced, money laid out and expended, and goods ſold and delivered to the plaintiffs *as aſſignees*, *ſince* the bankruptcy, and an account ſtated with them. To the 2d and 3d plea the plaintiffs demurred, and the defendant joined in demurrer.

Mr. *Cowper* (who argued from Mr. *Buller*'s notes in his abſence) in ſupport of the demurrer. 1ſt, Both pleas are bad. 2dly. The ſtatutes of ſet-off do not extend in any caſe to aſſignees of a bankrupt.

1ſt Point. Each plea goes to the *whole* declaration, and if bad as to any one count, they are bad for the whole. 1 *Saunders*, 28. Lord *Mancheſter* v. *Vale*. 1 *Lev.* 48. *Webb* v. *Martin*. In this laſt caſe, in *aſſumpſit* on ſeveral promiſes, it was held by the court on demurrer, that if the defendant plead the ſtatute of limitation generally to the whole declaration, and the plea is ill as to one count, it is ill for the whole. So if an executor plead ſeveral judgments, and the plea is bad as to one judgment, it is bad in reſpect of all. 2 *Saund.* 50. Here the firſt count is for money had and received *ſince* the bankruptcy to the uſe of the aſſignees. Neither

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RIDOUT *verſus* BROUGH.

ther of the pleas is good as to this count. For if the defendant ſhould be admitted to ſet off a debt due *before* the bankruptcy againſt money which he received *ſince*, there would be an end of the bankrupt laws. Becauſe then every man who was the creditor of a bankrupt, would by indemnities or ſome other trick, after an act of bankruptcy committed, get money into his hands, and by that means pay himſelf in preference to other creditors.

The other counts in the declaration are for money due *to* the *bankrupt*, *before* the bankruptcy. The laſt plea is wholly for money due to the *defendant*, *ſince* the bankruptcy from the *aſſignees*, therefore, that the plea is for a demand on different perſons from him, to whom the money was due, which is the ground of action; for the demand ſet off in this plea never was a debt from the *bankrupt*, nor could an action have been brought againſt the bankrupt for it; therefore the debts are not mutual. All the debts in the declaration but the firſt were due to the bankrupt, none in this plea were due from him.

But further, the ſubject matter of the laſt plea is ſuch, as cannot exiſt in point of law; for it ſuppoſes debts to have been contracted by the aſſignees in their political character, as ſuch; namely, for goods ſold and delivered, money lent, *&c. &c.* to them as *aſſignees*. Taking it as a debt due from them in their private capacities, there cannot be the leaſt colour for the ſet-off, for that would be ſetting off the debt of *A.* againſt the debt of *B.*: and in their political capacities they have not the power or ability of contracting ſuch debts to charge the bankrupt's eſtate. Therefore, on theſe ſpecial grounds, applicable to this particular point, both pleas are bad.

2d Point. Both pleas are likewiſe bad on the general principle of law, that the ſtatutes of ſet-off do not extend in any caſe to aſſignees of bankrupts, and, therefore, are not tenable either on the ſtat. 2 *Geo.* 2. *c.* 22. or on the ſtat. 5 *Geo.* 2. *c.* 30.

Firſt, Under the ſtat. 2 *Geo.* 2. no debt can be ſet off againſt another which is not mutual; and theſe debts never were mutual: for part of the plaintiff's demand is for a debt accruing ſince the bankruptcy, for which the bankrupt never could have had an action, and the firſt plea is for a demand due from the bankrupt. The other part of the plaintiff's demand is for money due to the bankrupt. The laſt plea is for a demand due from the aſſignees ſince the bankruptcy; and, therefore, if an action had been brought by the bankrupt for that part of the plaintiff's demand, the ſubject matter of this laſt plea never could have been ſet

up

up as a defence againſt it, for at that time this debt did not exiſt. Therefore theſe debts are not mutual. 1774.

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Secondly, Wherever there are mutual debts there muſt be mutual remedies; but in caſe of aſſignees there are not mutual remedies, for no action will lie againſt them. So determined in *Ryal* and *Larkin*, 1 *Wilſ.* 155. This caſe, according to another note, was conſidered both on the ſtatute of ſet-off and on the ſtat. 5 *Geo.* 2. and it was expreſsly holden not to be within the ſtatute of ſet-off, becauſe the defendant could not have an action againſt the aſſignees.

Laſtly, This ſet-off cannot be ſupported under the ſtat. 5 *Geo.* 2. for that ſtatute expreſsly requires "that it ſhall be made appear to "the commiſſioners, *&c.* and on it's being ſo made appear they "or the aſſignees may ſtate the account," *&c.* But to take advantage of this ſtatute the party muſt conform to the proviſions of it; that is, he muſt apply to the commiſſioners, and if they act improperly, he muſt appeal to the great ſeal. Beſides in this caſe even the commiſſioners could not allow the ſet-off, for under this act there can be no ſet-off but where the debts are due before the bankruptcy. But here part of the plaintiff's demand accrued ſince the bankruptcy, and all the demand compriſed in the laſt plea likewiſe aroſe ſince the bankruptcy. Therefore, whether conſidered as a general queſtion of law on the ſtat. 2 *Geo.* 2. or on the ſtat. 5 *Geo.* 2. or on the particular circumſtances of this caſe, and the impropriety of each plea with reſpect to the different parts of the declaration, theſe pleas cannot be ſupported.

Mr. *Withers*, *contrà*, for the defendant, as to the ſecond point, cited 2 *Vern.* 117. *Chapman* v. *Derby*, and 2 *Kelynge* 24. *pl.* 19. *Ex parte Riley.*

The Court were clearly of opinion with him on this point, that the defendant might ſet off a debt due to him from the bankrupt; for the *aſſignees* are the *bankrupt:* and ſeemed to impeach the deciſion in 1 *Wilſ.* 155. "that the ſtatutes of ſet-off "do not extend to aſſignees under a commiſſion of bankruptcy," as againſt the general principles of law, juſtice, and good ſenſe. But they were equally clear on the firſt point, that the laſt plea was bad, and the ſecond badly pleaded, being to the whole declaration. But they gave the defendant leave to amend his plea, upon payment of coſts and other terms.

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Same day.

REX *verſus* STOKES.

One, in cuſtody upon an attachment for non payment of coſts under ſtat. 5 & 6 *W. & M. c.* 11. *ſect.* 3. may be diſcharged under the lords' act, 32 *Geo.* 2. *c.* 28. *ſect.* 13.

THE defendant had been convicted of an aſſault, and ſentenced to four months impriſonment which were expired: but he was continued in cuſtody on an attachment for non-payment of coſts taxed, purſuant to a recognizance entered into by him on his removal of the indictment from the quarter-ſeſſions.

Mr. *Lucas* had moved for his being diſcharged under the ſtat. 32 *Geo.* 2. *c.* 28. *ſect.* 13. commonly called the lords' act. Mr. *Cowper* now ſhewed for cauſe that this ſtatute does not relate to coſts accrued in *criminal* caſes. Mr. *Lucas* in ſupport of the rule inſiſted that the defendant was in execution, and therefore within the ſtat. 32 *Geo.* 2. *c.* 28. *ſect.* 13. the words of which are, that "if any perſon, *&c.* ſhall be charged in *execution* for "any ſum or ſums not exceeding in the whole 100*l.* &c." The Court inclined to think this caſe was not within the act, and the defendant was remanded.—But the next day Mr. Juſtice *Aſton* aſked Mr. *Lucas*, if he knew of any caſe where a perſon had been diſcharged out of cuſtody on the lords' act, upon an attachment in a *civil* ſuit; and mentioned the caſe of *Rex* v. *Stokes*, *Mich.* 23 *Geo.* 2. *B. R.* which was an application by the defendant, who was in cuſtody upon an attachment for a reſcous upon an execution, to be diſcharged under the act of *indemnity* 20 *Geo.* 2. *c.* 52. Upon ſhewing cauſe it was objected that the ſtatute in *ſect.* 26. contained an exception as to all perſons guilty of *contempts*. But *Lee* Chief Juſtice there ſaid, "it was not "a contempt within the proviſion of that ſection, the contempts "there excepted being confined to caſes where the rights of the "ſubject only are concerned, and, therefore, the court held "that the defendant was entitled to his diſcharge."—The contempts ſo excepted by that act are in caſes of proſecutions in the name of the crown, at the charge of a private party, and the words of exception are, "unleſs the defendant in ſuch pro-"ſecution ſhall pay to ſuch private proſecutor, his executor or "adminiſtrator, ſuch coſts as the court where, *&c.* ſhall award "to be paid." Now the words of the ſtat. 5 & 6 *Wm. & Mary*, *c.* 11. *ſ.* 3. are in ſubſtance the ſame as thoſe of the ſtat. 20 *Geo.* 2. *c.* 52. *ſect.* 26. namely; "that the court of *King's*

"*Bench*

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REX *verſus* STOKES.

" *Bench* ſhall on conviction give reaſonable coſts to the *party* " injured, *&c.* who ſhall *proſecute*, &c. which coſts ſhall be " taxed according to the courſe of the court:" and therefore in reſpect of coſts it appears to me that theſe are in like manner rights of the ſubject, with which the crown under a general act of grace could not interfere: if ſo, I incline to think that this is as much a civil ſuit as the caſes excepted under the ſtat. 20 *Geo.* 2. *c.* 52. and it would be a very hard caſe, if the defendant could not be diſcharged under the lords' act, nor under a general act of pardon; for then he muſt be remedileſs.—*It was adjourned*, that precedents might be ſearched into.

Afterwards, on the laſt day of the term, Mr. *Lucas* cited a caſe from 5 *Viner's Abridgment*, title *Contempt* (D), *pl.* 10. *Baſtram* v. *Dennet*, where the court held " that an *attachment* " after a decree for diſmiſſion is in nature of an *execution* at " law, and a general pardon may pardon the *contempt*, but not " the *debt*." Mr. *Cowper contra*, inſiſted that there was no inſtance of a perſon in contempt being diſcharged under an inſolvent act: with reſpect to an attachment being in the nature of a civil action, it clearly was not: becauſe then the defendant might be declared againſt; but here he is not ſo in cuſtody of the marſhal as that he might be ſerved with a declaration.

Mr. Juſtice *Aſton*. (Lord *Mansfield* gone.) An attachment is an execution in a civil ſuit, and I apprehend it has long ſince been ſettled to be ſo. In the preſent caſe the contempt has no *relation* to the offence committed by the defendant, which, as far as public juſtice is concerned, has been ſufficiently purged by the impriſonment he has ſuffered: but it ariſes upon an act of parliament 5 *&* 6 *W. &* *M. c.* 11. which directs " the coſts " in theſe caſes to be taxed by the maſter, and unleſs paid in ten " days, an attachment to iſſue." This ſtage of the cauſe therefore, is merely of a *civil* nature; and a matter ſolely between *party* and *party* unconnected with the *offence* itſelf. It ſeems that no caſe in point has been found: But the ſtat. 9 *Geo.* 3. *c.* 26. for the relief of inſolvent debtors, is in my opinion a legiſlative recognition that they ſhall have the benefit in ſuch caſes. This laſt act indeed is temporary; but the lords' act is perpetual; and they are *in pari materiâ*: and therefore as the attachment is an execution for the *debt* to the *party*, whether the coſts are taxed by the maſter of the crown office, or on the civil ſide, the defendant is equally entitled to his diſcharge. If not, the conſequence muſt be impriſonment for life: for a general

1774. general pardon would not extend to him, as was agreed in the case of *Rex* v. *Stokes*. *Mich.* 23 *Geo.* 2.

REX *verſus* STOKES.

Mr. Juſtice *Willes*. Theſe ſtatutes which are made in favour of the liberty of the ſubject, ought always to receive a liberal conſtruction. This is in all reſpects as a *civil debt*; and does not differ from the caſe of *other civil* demands. It ſeems to me that the ſtat. 9 *Geo.* 3. *c.* 26. meant to extend the benefit to inſolvent debtors in the fulleſt manner; and I am the more inclined to adopt a liberal conſtruction in this caſe, as the defendant, who is a *minor*, may otherwiſe lie in gaol for life.

Mr. Juſtice *Aſhhurſt*. I am of opinion that this caſe may fairly be included under the words "debtor and creditor" in the lords' act: and therefore think the defendant ought to be diſcharged: eſpecially, as otherwiſe he muſt be without remedy: becauſe the king cannot by a general pardon releaſe a *civil* debt; and no other alternative is open.

Rule made abſolute.

Monday, June 20th.

BLANDFORD and others, executors of FROUD, *verſus* FOOTE.

If the cauſe of action ariſes before bankruptcy, intereſts and coſts accrued ſince, are likewiſe diſcharged, by ſtat. 12 Geo. 3. c. 47. ſect. 2.

UPON a rule to ſhew cauſe why the defendant who was an *uncertificated* bankrupt, and in cuſtody upon a *ca. ſa.* ſhould not be diſcharged under the ſtat. 12 *Geo.* 3. *c.* 47. *ſect.* 2. the facts appeared to be as follow. The defendant became indebted to the teſtator *Froud* upon bond in the year 1756, and about two years afterwards became bankrupt: ſubſequent to the bankruptcy, *Froud* brought an action upon the bond, obtained judgment, and died. After which, the executors brought a new action upon the judgment, and on this laſt action the defendant was now in cuſtody.

Mr. *Mansfield*, who ſhewed cauſe inſiſted, that the judgment upon which the defendant had been taken, being ſubſequent to the commiſſion ſued out, the defendant was not within the favour of the ſtatute; which expreſsly relates to any debt or debts due or contracted before ſuch commiſſion iſſued, and to ſuch debts only.

Mr. *Baldwin contra*. That the defendant ought to be diſcharged; for though the judgment was ſigned after the commiſſion iſſued, yet the cauſe of action was antecedent to the commiſſion, and therefore within the intention of the ſtatute.

Lord

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BLANDFORD *verſus* FOOTE.

Lord Mansfield. The only doubt that can ariſe in this caſe is with reſpect to the intereſt and coſts accrued ſince the bankruptcy: but I think they ſtand upon the ſame foundation as the original debt which was clearly due before the bankruptcy, and therefore are equally within the benefit of the ſtatute.

Mr. Juſtice *Willes.* I am of the ſame opinion. A caſe of this ſort once came before me, and I conſulted with my brothers upon it, who all agreed that the whole related to the original debt, and therefore was within the act. Mr. Juſtice *Aſton* and Mr. Juſtice *Aſhhurſt* concurred.

Rule made abſolute.

REX *verſus* Overſeers of BRIDGEWATER.

Same day.

UPON ſhewing cauſe why ſeveral appointments of overſeers ſhould not be quaſhed, the caſe appeared to be a conteſt between two adverſe ſets of Borough Juſtices. Each ſet met before midnight of *Eaſter* eve: and each began making their appointments of overſeers the inſtant the clock had ſtruck twelve; and ſo kept on renewing the ſame appointments for an hour or two. But one ſet of them made a freſh appointment at eight o'clock on the *Sunday* morning; ſuppoſing that there would be a conteſt concerning the priority of thoſe appointments which were made ſoon after midnight, and perhaps all of them bad.

Mr. *Hotchkin* ſhewed cauſe, and cited 3 *Bur.* 1595. *Swan* v. *Broome*, to prove the appointments good.

Lord *Mansfield.* The conduct of the Juſtices in this caſe is a ſhameful proſtitution and abuſe of their office for election purpoſes; and I wiſh any perſon could be found who would undertake to proſecute both parties. It would have been more for the intereſt of either ſide to have waited for a legal appointment on the *Monday.* I do not know that there is any authority which ſays that an appointment made on a *Sunday* is good; but it certainly is not a day for ſuch purpoſes as theſe; and therefore I will not give my ſanction to any of the appointments. Let all the appointments be ſet aſide, and a *mandamus* be directed to the juſtices to make a new appointment; and let the mayor give two days notice of the time and place of meeting for ſuch new appointment.

The three other judges concurred.

N. B. The matter was afterwards agreed between the parties.

The

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The Archbishop of CANTERBURY *versus* HOUSE.

A creditor has a right *ex debito justitiæ*, as well as the next of kin, to sue upon an administration bond in the name of the archbishop or his ordinary.

UPON a rule to shew cause, why the proceedings in an action upon an administration bond sued in the name of the archbishop in this case, should not be staid with costs to be paid by the assignee of the archbishop; the grounds for staying the proceedings were; *first*, that in fact the assignee, who was a *creditor* only, had no authority from the archbishop. 2dly. That it was not competent to the archbishop to depute such authority to a *creditor*.

Mr. *Wallace*, who shewed cause, cited *Greenside* v. *Benson*, 3 *Atk.* 248. as a case in point, that a creditor has a right to sue upon the administration bond. And with respect to the first point, it appeared clearly, upon the affidavits, that the archbishop had given an authority to the plaintiff to sue in his name, and that the attorney for the defendant was fully apprised of it; though upon a personal application by the defendant's attorney, to know if such authority were granted, the secretary of the archbishop at first informed him it had been refused, because Dr. *Ducarrel* had advised the archbishop, that it could not be granted to a creditor.

Lord *Mansfield*. No next of kin ever struggled for the administration of an insolvent estate with an honest view. What the object of the administratrix was in this case is very manifest upon the affidavits that have been read: namely, to sell the administration to the creditors. But failing of that purpose, after having obtained the administration, she makes use of all sort of chicane, delay, and false pleas to defeat the creditors, and at length absconds. This is the general state of the case. At last a creditor or creditors have brought an action upon the administration-bond in the name of the archbishop, and this is an application on the part of the administratrix to stay the proceedings in the name of the archbishop with costs, on two grounds: in the first place, that it is not competent to the archbishop to authorize a creditor to put the bond in suit, but only the next of kin. 2dly. That the archbishop in his private person, has not deputed such authority to the present plaintiff.

With respect to the first point, let us see what it is which the act requires the archbishop or his ordinary to do: "He "is to grant administration and to take bonds with condition "that the administrators shall duly administer the intestate's "effects; that they shall give an account of such their admini-"stration,

" ſtration, and make an inventory of the goods and chattels, " and that they ſhall pay the ſurplus to the next of kin." Now it is agreed, that if the next of kin is deſirous of ſuing upon this bond, the court will direct the ordinary to permit his name to be uſed, becauſe the next of kin is intereſted in the ſurplus. In like manner if ſuch application is made by a creditor, I ſee no reaſon why he ſhould not have the ſame privilege; and I know of no authority which ſays, that the ordinary cannot empower him to put the bond in ſuit. On the contrary, it is *ex debito juſtitiæ* that he ought to do ſo: for though a creditor has no concern in the latter part of the condition, namely " the " diſtribution of the ſurplus among the next of kin," yet he is moſt materially and *principally* intereſted in the adminiſtrator's delivering in a *true inventory* and in the due adminiſtration of the effects. To one who has a *right*, it is *ex debito juſtitiæ* to *grant* the liberty of ſuing in the archbiſhop's name; to one who has *no* right, it is *ex debito juſtitiæ* to *refuſe* it. As to the objection that it is liable to be abuſed, if any bad uſe were made of it, the court would no doubt ſet aſide the proceedings. But in the preſent caſe, there is no pretence or even ſuggeſtion of any abuſe: and therefore I am clearly of opinion that the plaintiff is well entitled to put the bond in ſuit.

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ARCHBISHOP of CANTERBURY *verſus* HOUSE.

The next ground is, that the archbiſhop in his *private perſon* gave no ſuch authority to the preſent plaintiff. I think a perſonal application to the archbiſhop was very improper; for it is not his *perſonal* affair; his name is uſed *officially* only: and therefore I am not ſurpriſed that the archbiſhop ſhould not recollect what was requiſite upon the occaſion. He might refer it to Dr. *Ducarell*; and if Dr. *Ducarell* gave the anſwer that is ſtated, he was ill adviſed. If the caſe reſted there, and the attorney had been miſled by that anſwer, it would have operated differently as to the coſts. But it is in evidence that he had the fulleſt information afterwards that the archbiſhop had authorized the plaintiff to ſue in his name. And therefore I am of opinion that the rule ſhould be diſcharged with coſts, to be paid by Mr. *Aylett* the attorney for the defendant.

The three other judges concurred.

GILLMAN *verſus* HILL.

Thurſday, June 21ſt.

THIS was a rule to ſhew cauſe why judgment of execution in this caſe ſhould not be ſet aſide with coſts, and the goods taken in execution reſtored; or if ſold, why ſatisfaction ſhould

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GILLMAN verſus HILL.

ſhould not be made by the plaintiff, and why the warrant of attorney upon which the judgment was ſigned ſhould not be cancelled. The rule was obtained upon an affidavit, ſtating, that the warrant of attorney was given by the defendant, whilſt in cuſtody, without any attorney being preſent on his behalf, though he had propoſed to ſend for one: but was perſuaded by the ſheriff's officer, that the attorney's clerk, who attended for the plaintiff, would do as well. But now, upon reading the affidavit, it ſtated further, that the defendant was the more induced to ſign and execute the bond and warrant of attorney, becauſe he had before been informed, that if he did execute it under an arreſt, and without his attorney being preſent, it would be void.

Mr. *Buller* ſhewed for cauſe, that upon the face of this affidavit it was clear the defendant was fully apprized of the act he was about to do; and aſſented to the propoſal made with a manifeſt view to defraud the plaintiff.

Mr. *Bearcroft contra*, relied upon the two rules of court, *Paſ.* 15 *Car.* 2. and *Paſ.* 4 *Geo.* 2. the latter of which, taking notice of the great inconveniencies ariſing from a warrant of attorney to confeſs judgment by one in cuſtody being held good, if any attorney, though for the oppoſite party, was preſent, expreſsly provides, that for the future there ſhall be an attorney preſent on behalf of the defendant.

Lord *Mansfield*. I ſhall ſay of theſe rules, what the court of *Chancery* has often ſaid with reſpect to the ſtatute of frauds; *that no rule of the court ſhall be made an inſtrument of fraud.* Theſe rules were made for the protection of indigent defendants againſt the practices of hard deſigning plaintiffs; and therefore have admitted of many *exceptions* under *circumſtances*: as where a perſon who is in priſon at *one* man's ſuit, executes a warrant of attorney to confeſs judgment to *another* who did not arreſt him. There the judgment is well given; for the *cauſe* fails*; and therefore though within the *letter* it is not within the *intent* of the rule. Much leſs will the court ſuffer a defendant to convert that which was meant for his protection into an inſtrument of fraud and deceit: and here it is avowed by the defendant himſelf in his own affidavit that he intended to cheat the plaintiff. Therefore let the rule be diſcharged with coſts.

* 2 Lord *Raym.* 797. 3 *Bur.* 1793.

The three other judges concurred.

THE END OF TRINITY TERM.

MICHAELMAS TERM

15 GEORGE III. B. R. 1774.

VALLEJO and another *verſus* WHEELER.

Thurſday, Nov. 10th.

THIS was an action on a policy of aſſurance upon goods on board the *Thomas* and *Matthew*, from *London* to *Seville*. The policy was made in the common form, with liberty to touch at any ports or places, &c. The loſs was aſſigned different ways in the declaration; *Firſt*, by ſtorms and perils of the ſea, in conſequence of which, the ſhip was obliged to go to *Dartmouth* to be repaired; and that afterwards, a further loſs happened by ſtorms, &c. *Secondly*, That it happened by ſtorms and perils of the ſeas in the voyage generally; and *Thirdly*, by the *barratry* of the maſter.

Barratry is every ſpecies of fraud or knavery in the maſter or mariners of a ſhip, by which the owners or freighters are injured; and a deviation, if ſuch, is barratry; whether the loſs happen during ſuch fraudulent voyage, or after. *Otherwiſe*, if the deviation be with their privity or conſent.

The cauſe was tried before Mr. Juſtice *Aſhhurſt* at *Guildhall*, at the ſittings after *Eaſter* term 1774, by a ſpecial jury. On the trial it was proved, that this ſhip was put up as a general ſhip from *London* to *Seville*, and was let to freight by one *Darwin*, who chartered her to *Brown* the captain. That it is the courſe of veſſels going on this voyage, to ſtop at ſome port in the weſt of *Cornwall*, to take in proviſions. That this ſhip having taken her cargo aboard, ſailed from *London* to the *Downs*; while ſhe lay there, all the other ſhips bound to the weſtward bore away; but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was *out* of the *courſe* of the voyage. That the captain went there for his own convenience, to take in brandy and wine on his own account; after which he intended to proceed to *Cornwall*. That the night after the ſhip quitted *Guernſey*, ſhe ſprung a leak, which obliged her to put into *Dartmouth*.

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When ſhe was refitted ſhe ſet ſail again and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop to take in proviſions; but in her way ſhe received further damage, and at her arrival was totally incapable of proceeding on the voyage, and the goods were much damaged.

It was attempted on the part of the defendant to prove, that *Willes* was the owner of the ſhip; that the voyage to *Guernſey*. was on his account, and the goods taken on board there his property: but this evidence went little further than information and belief, except that it was proved, that when the ſhip arrived at *Helford*, the wine was delivered to him in his cellar.

The judge directed the jury, that if the going to *Guernſey* was *without the knowledge* of *Darwin*, it was barratry; and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: and if they ſhould be of opinion that it was without the knowlege of *Darwin*, then he deſired them to ſay, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and ſaid they thought the going to *Guernſey* was without the knowledge of *Darwin*, whom they looked upon to be the owner, but they thought it was with the knowlege of *Willes*.

In Trinity term laſt, a motion was made for a new trial; and on ſhewing cauſe all the counſel on each ſide were heard. The court then ſaid, there were two points in the caſe. *Firſt*, Whether to entitle the plaintiff to recover, the loſs muſt not have happened during the time of the barratry, or have been occaſioned immediately by the act of barratry. If a policy be on a ſhip, and the ſhip is ſeized for ſmuggling, that is barratry; but here the goods were not ſeized for ſmuggling, nor did the loſs happen during the act of barratry, but afterwards. *Secondly*, Whether though the ſhip were let to freight, the captain was not ſubject to the orders of the owners. If a ſhip be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the owner of the veſſel would have the direction of her, and the hiring of the maſter and mariners.

The court ordered that the caſe ſhould ſtand over till this term, and be argued by one counſel on each ſide. It was now argued by Mr. *Buller* for the plaintiff, and Mr. *Alleyne* for the defendant.

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For the plaintiffs. The queſtion is, Whether the plaintiffs are entitled to recover for this damage from the underwriters? In order to ſupport their claim they inſiſt, that the conduct of the maſter in going to *Guernſey*, for the purpoſe and under the circumſtances mentioned, was *barratry*.

Suppoſing this to be barratry, then another queſtion will ariſe, namely, Whether the loſs ſuſtained by the plaintiffs was in conſequence of that barratry; or, whether that loſs ſtands ſo totally unconnected with the voyage to *Guernſey*, as to be quite unaffected by it?

In all the caſes that have occurred on barratry, different definitions of the word have been attempted; and the ſame conduct has been obſerved in the preſent caſe: however, there will not be much difficulty in determining what is meant by the term in its *general* ſenſe, whatever nicety may ariſe in fixing the *preciſe* limits of it, when occaſion requires that ſhould be done. Wherever a great nicety does ariſe, the inſured ſhould be entitled to the turn of the ſcale: for the end and view of inſuring is, to ſecure the merchant againſt all loſſes and misfortunes whatever: and ſo very liberal are the underwriters in theſe days of their profeſſions in policies of what they do inſure againſt, that ſome writers have thought it next to impoſſible that where a loſs does happen a doubt ſhould remain. *Molloy*, B. II. *cap.* 7. *ſect.* 7. ſays, "almoſt all thoſe curious "queſtions that former ages and the civilians according to the "marine law, nay and the common lawyers too, have contro-"verted, are now out of debate. Scarce any misfortune that "can happen, or proviſion to be made, but the ſame is pro-"vided for in the policies that are now uſed: for they inſure "againſt heaven and earth, ſtreſs of weather, or whatſoever "detriment ſhall happen or come to the thing inſured."

Barratry in all the dictionaries is defined to be *fraus*, *dolus*, or *deceptio*. So are *Minſheu*, *Dufreſne*, and *Spelman*.

Fraud means not only a crime, but any wilful fault or evil deſign; and even a neglect, provided it be *craſſa negligentia*, will amount to barratry; which was the caſe of a maſter ſailing out of port without paying duties[a]. That caſe approaches the neareſt to the preſent of any that can be found, and even goes beyond it. That was merely a neglect, and might have been by accident, as well as deſign; but becauſe it ſubjected the ſhip to forfeiture, it was holden to be barratry.

[a] 1 Str. 582.

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In this case the consequence was the same; for the act of the captain subjected the ship and the goods insured to forfeiture: but the act done was infinitely worse. It did not rest merely in a non-feasance, but was a formed premeditated scheme of running away with the ship out of the course of the voyage; done for an illegal purpose, for his own private benefit, without any excuse or necessity, and neither for the benefit nor with the knowledge of the owner or freighter.

One definition of barratry given at the bar was, where the master and mariners conspire together to run away with the ship. That certainly is one species of barratry; but it can never serve as a general description of it; if it were, barratry could never be committed without the concurrence of the mariners as well as the master: the contrary of which is clear from the case of the master not paying duties, and from every other case on the subject: and barratry may be committed by the master alone, or by the sailors alone. *Postlethwaite* in his *Dictio. Tr. and Com.* vol. 1. p. 214. says, "barratry is when the master "of a ship or the mariners cheat the owners or insurers, whether "by running away with the ship, sinking her, deserting her, "or embezzling the cargo." The owners or insurers are as much cheated and defrauded if the vessel is run away with by the sailors, as if it is run away with by the master. But *Postlethwaite* in 1 vol. 136, title *Assurance*, gives a definition of barratry which applies more immediately to the present case. He says "one species of barratry in a marine sense is, when "the master of a ship defrauds the owners or insurers by "carrying a ship a different course to their orders."

The only two cases in the common law books that are worth mentioning are *Knight* versus *Cambridge*, *Str.* 581. 1 Lord *Raym.* 1349. *S. C.* and *Stamma* versus *Brown*. *Str.* 1173. In the first of these cases it is holden that barratry extends to every fraud of the master; and what is said at the conclusion of that case, is the best doctrine that can prevail in insurances. "The end of insuring is to be safe at all events; and it would "be very prejudicial if the court were to be making loop-holes "to get out of policies. The insurer knows the master, and "whether he can trust him; and he that insures against his run-"ning away with the ship, never imagined he might or would be "guilty of any other fraud." The principles of the second case apply very strongly to the present: for here there was a formed design to deceive the insured; the captain did not go to *Guern-*

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ſey for the benefit of his owners, but for his own benefit only; and in going there he acted inconſiſtent with his duty to his owners.

It was ſaid in the former argument, that it would be very extraordinary if the underwriter was to inſure againſt the act of perſons employed by the inſured, and who were unknown to the inſurer. As to that point, it is obſervable in the *firſt* place that this was a *general* ſhip; a circumſtance that is much relied on among merchants, and which in this caſe is by them eſteemed deciſive on the preſent ſubject. And there ſeems to be great reaſon for a diſtinction between a *general* ſhip, and one that is *let to freight* to a *ſingle* perſon only. The former carries the goods of all mankind; every man that chuſes is at liberty to load his goods aboard her; and the merchant who ſhips his goods in ſuch a veſſel, has no command over her He does not hire or employ the maſter; neither is the maſter ſubject to his order or direction during the voyage. But in the caſe of a veſſel let to freight to one merchant only, and by him alone freighted, he may be ſuppoſed to employ the maſter, and have the direction of the veſſel and the voyage; and therefore whatever is done by the captain is to be conſidered as done by the merchant's ſervant.

But 2dly, it muſt be preſumed the maſter is known to the inſurer; if not, it is the inſurer's own fault, and he ſhall not avail himſelf of the want of ſuch knowledge. Every policy ſpecifies who is the maſter; and if the inſurer agrees by his contract (as in policies is often done) that any other perſon at the election of the inſured may go as maſter, that is waiving a perſonal knowledge of him; and no objection can then be made by the inſurer, for want of knowing who the maſter is. In this caſe *Brown*, who was the man that went as maſter, is the perſon mentioned in the policy.

If this queſtion were tried by the laws of any other mercantile country it would hardly admit of a doubt. 2d. *Magenſ. Ord. Middleb. ſect.* 14. *Ord. Rotterd. ſect.* 52. *Ord. Amſterd. ſect.* 6. *Ord. Hamb. tit.* 4. *ſect.* 6. *tit.* 5. *ſect.* 1. *tit.* 7. *ſect.* 1. *Ord. Stockholm, art.* 5. *ſ.* 11. 16. *art.* 6. *ſ.* 14. There is no ordinance of *Florence* that applies immediately to this point: but from the form of their policies, it may be collected what would be the determination of that place on the matter; for they inſure againſt all perils, misfortunes, and other caſes and accidents even ſuch as cannot be thought of. And in their

1774. ordinances there is a proviſion, that in caſe of a diſpute, the underwriter ſhall pay the money firſt and go to law afterwards.

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Theſe ordinances are founded on good ſenſe and ſound reaſon, when the nature of inſurances is conſidered: and in mercantile tranſactions, and ſuch general ſubjects as this is, no doubt, the laws of other countries will have their weight in the courts of *England*.

The end and meaning of an inſurance is, to enable one man, for a valuable conſideration, to put another in his place to a certain amount, for all riſks and perils which the firſt man may ſuſtain. All that is requiſite on the part of the aſſured in theſe contracts is, that they are made *bonâ fide* without fraud, concealment, or contrivance: and where that is done, the policies and ordinances of the different countries mentioned, ſeem all to agree in this, that every peril is inſured againſt, except ſuch as happen by the means, conſent, or privity of the inſured.

Inſurances in *England* are not meant, either by the law or the parties, to be narrower or more confined than policies in other countries; and though, after a loſs has happened, underwriters catch at every reed they can to avoid paying the inſurance money, yet if the queſtion were put to them at the time of underwriting, even *they* would not heſitate to declare themſelves liable for many accidents which are afterwards called into very ſerious debate.

Not long ago a queſtion was made, whether the underwriter ſhould be liable where the ſhip was not ſea worthy, but the defect unknown to the inſured. The underwriter ſucceeded, and was holden not to be liable; but what was the conſequence? A clauſe was inſerted in the policies (as it is in the preſent) that any inſufficiency in the ſhip, not known to the aſſured, ſhould not prejudice the inſurance: and the underwriters ſubſcribed with this clauſe for the ſame premium as they did before without it. This is a pretty ſtrong proof what they would have ſaid themſelves, if they had been aſked that queſtion before they under-wrote; though their opinions were altered after the loſs had happened: it is alſo a proof, that they conſidered their obligations to be as extenſive as thoſe on underwriters in other countries; and that they were anſwerable for all loſſes not occaſioned by the means, conſent, or knowledge of the inſured.

On theſe authorities and for theſe reaſons, it may be ſaid, the going to *Guernſey* in the manner and for the purpoſe the maſter of this veſſel did, was barratry: and it is the more certain,

tain, becauſe the court ſaid in the laſt term, that if this ſhip had been ſeiſed as forfeited on account of this ſmuggling tranſaction it clearly would have been barratry. Now the ſeizure could not be the act that conſtituted the barratry; but it muſt have been ſomething preceding: namely, the going to *Guernſey* for an illicit purpoſe, and doing an act which ſubjected the ſhip and goods to ſeizure. For in the caſe of not paying duties, it does not appear that any ſeizure was actually made; but it was holden barratry becauſe the goods were *liable to be* ſeized. 1774. VALLEJO *verſus* WHEELER.

Suppoſing this to be barratry, then the only queſtion which remains is, Whether the loſs that the plaintiffs have ſuſtained was in conſequence of that barratry?

The beſt way of determining this queſtion is to ſee whether the accident would have happened if the ſhip had never gone to *Guernſey*; and it certainly would not: for the ſtorm happened and the accident was received before the ſhip got into her proper courſe to *Helford*. If ſhe had not gone to *Guernſey* ſhe would never have met with the ſtorm.

In the next place, ſuppoſe the ſhip had never gone to *Guernſey*, but had purſued her proper courſe and the goods had been damaged in the manner they now were; What would have been the conſequence with reſpect to the inſured? they would have been entitled to a ſatisfaction from the inſurers. What then ſhall excuſe the inſurers now? Shall the barratry of the maſter? there is nothing elſe to excuſe them: but barratry, inſtead of excuſing, makes the underwriter liable.

But 1ſt, It is not neceſſary that the injury ſhould be received, in the very act of committing the barratry: and 2dly, If it were, this injury was received during the act of barratry. What is the act of barratry? running away with the ſhip for an illegal purpoſe. The inſtant the maſter had changed the courſe of the ſhip's voyage, for the purpoſe he did, he had committed barratry. Muſt the injury then be received at the moment he varied his proper courſe, in order to charge the inſurer? Suppoſe the injury had been received juſt before he got to *Guernſey*, or in going into *Guernſey*, ſhould not the underwriter be liable? and if liable for a damage done before he got into *Guernſey*, why ſhall he not alſo be liable, for an injury ſuſtained after he left *Guernſey*?

If the inſurer were to be diſcharged from this loſs, becauſe it did not happen in the moment of the barratry's being committed,

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mitted, the condition of the inſured would be unfortunate indeed! for if it had not been for the barratry, and the loſs had happened, he certainly would have been entitled to the benefit of his policy; and therefore his condition would be this; by means of the barratry of the maſter, which is one of the accidents he inſures againſt, he would loſe his goods, and the benefit of his policy likewiſe.

But 2dly, this injury was received during the act of barratry. The maſter went to *Guernſey* in order to take contraband goods aboard his veſſel, and ſmuggle them to *England*. At the time the loſs happened he was bringing the ſmuggled goods to *England*, but he had not then completed his purpoſe; and was at that time purſuing his barratical deſign.

For all or ſome of theſe reaſons the plaintiffs would be entitled to the judgment of the court, even if the caſe had come on in a very different ſhape from what it now does.

But here the queſtion is, Whether the defendant is entitled through the favour and interpoſition of the court to a new trial, which the court will not grant, unleſs it be clear that the verdict is againſt law. If it be doubtful, the caſe ought not to undergo further litigation: for it has already been tried by a ſpecial jury of merchants, among whom was a very conſiderable underwriter. They who are converſant with buſineſs of this kind, have entertained no doubts; and the verdict given was with the entire approbation of the judge who tried the cauſe: therefore a new trial cannot be granted without reprobating the verdict that has already been given.

Mr. *Alleyne*, for the defendant argued, that barratry was,

1ſt. Where an injury is committed by the maſter and mariners, which cauſes a confiſcation.

2dly. Where a direct injury is done to the owners, with a direct intention to commit that injury.

Though in the preſent caſe a ſmall quantity of brandy was found on board the veſſel, which was confiſcable, yet this cargo was found not to be ſo.

Barratry means mal-practice, or deceit, with reſpect to ſhips or goods, *Savary Dictionnaire de Commerce, tit. Barratry. Molloy*, 2 *B.* 13. conſiders barratry as a mal-practice againſt the cargo. *Poſtlethwaite Dict. Trade* and *Commerce*, 214. "Barratry is "where the maſter of a ſhip, or mariners, cheat the owners or "inſurers

" insurers, whether by running away with the ship, sinking her, 1774.
" deserting her, or embezzling the cargo." The act of the master is not insured against, unless barratry is mentioned: and the underwriter is not liable, unless the act of the master does amount to barratry. VALLEJO versus WHEELER.

By the *Ord.* of *Rotterd.* 43. 52. it is provided, " that owners " shall not insure against the barratry of masters of their own ap- " pointment, but may against his neglect." All the ordinances cited for the plaintiffs are open to this observation, that they are *positivi juris*.

If the doctrine laid down on the other side were to hold, every neglect of the master would amount to barratry.

In the case of *Johnson* versus *Provideot*, at the sittings in *London*, it was holden, that a ship staying in the *West Indies* till the hurricanes came on, did not amount to barratry.

Lord MANSFIELD. That was holden to be a deviation.

Mr. *Alleyne*. Every deviation is not barratry. In *Shamm* versus *Brown*, the chief justice did not say what was barratry: in *Elton* versus *Brogden*, *Stra.* 1264, the crew opposed the captain, and forced him to go contrary to orders; and yet that was holden not to be barratry; but it was adjudged to be one of the accidents insured against, and so the insurers were liable. Therefore a consequential injury is not within the meaning of barratry, but it must be direct and designed.

In this case *Darwin* was not the owner, neither did he appoint the master.

Lastly, it cannot be contended that this was done with a view to defraud the owners, because his intention was only to get a little money himself, without injuring them.

In reply, Mr. *Buller* insisted, that the voyage insured was totally at an end, and it was impossible, after that, ever to get into what could be called the course of this voyage from *London* to *Seville*; for that having been deserted, the policy was forfeited or discharged, and could never be brought into force again.

Though the ship and cargo in this case were not seized as forfeited, yet they were all liable to be forfeited, by having smuggled goods aboard: therefore the act done was equally unlawful; and would in law as much constitute barratry as if the goods had actually been seized.

With respect to the several definitions given of barratry in the books cited for the defendant, though they might properly comprehend some species of barratry, yet they did not

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import to be a general definition of it, and to comprehend all caſes. *Poſſlethwaite* 1 vol. 136. is more general in his deſcription of it, and more applicable to the preſent caſe; and the propriety of his definition has not been denied.

Though it may be true that the act of the maſter is not inſured againſt unleſs barratry is mentioned in the policy; yet the reverſe is equally true: namely, where barratry *is* mentioned, the act of the maſter, though done by him only, and without the concurrence of the crew, is inſured againſt. And though by the *Ords.* of *Rotterdam*, an owner cannot inſure againſt the barratry of a maſter of his own chuſing, yet the law of *England* clearly is different: and notwithſtanding the maſter is appointed by the owner, there is not a policy which amongſt other perils does not guard againſt the barratry of the maſter.

It is true that all the ordinances cited are *poſitivi Juris*: and therefore if the law here is ſettled contrary to them, they cannot prevail; but if not, the law of foreign countries in mercantile tranſactions, has always been attended to in courts of Juſtice in *England*, and will afford a reaſonable ground to decide in doubtful caſes.

As to *Darwin*'s not being the owner, it has already been ſtated how far he appears to have been ſo; and in fact he did appoint the maſter for this voyage. And though the captain's principal view in this caſe might be to put money in his own pocket, yet that does not at all leſſen the offence which he has been guilty of, or alter the fraud which he has practiſed againſt the owners. By going to *Guernſey* he has defrauded them, and unleſs that does amount to barratry, he has deprived them of all benefit of their inſurances. In the caſe of ſailing out of port without paying duties, the captain did not mean to ſteal the goods; he intended only to have put that money in his own pocket; and if he had not been detected would ſtill have carried and delivered the goods in the deſtined voyage.

Here the act done was for the captain's private benefit, without the knowledge of the inſured; on the contrary it was to their prejudice, it endangered the loſs of their goods, deſtroyed the policy unleſs it amounted to a forfeiture of it; and was unlawful in itſelf, for which reaſon it amounted to barratry.

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Lord MANSFIELD, after ſtating the caſe at large, delivered his opinion as follows:

The ground of the motion for a new trial in this caſe is, that under the circumſtances of the caſe as they were given in evidence to the jury, the carrying the ſhip to *Guernſey* was merely a *deviation* but not *barratry*: and much more ſtreſs was laid at the trial, than in either of the arguments, upon this particular fact; namely, that the deviation being with the knowledge of *Willes* the owner (though not owner *pro hâc vice*) of the ſhip, it could never be barratry: the jury therefore were preſſed to ſay whether it was with the conſent of *Willes* or not; and they ſaid it was. To be ſure nothing is ſo clear, as that if the owner of a ſhip inſures and brings an action on the policy, he can never ſet up as a crime a thing done by his own direction or conſent. It was, therefore, a material fact to proceed upon, if *Willes* had had any thing to do in the caſe; but he had not.

It appeared to me that the nature of barratry had not been judicially conſidered, or defined in *England* with accuracy. In all mercantile tranſactions the great object ſhould be certainty: and therefore, it is of more conſequence that a rule ſhould be certain, than whether the rule is eſtabliſhed one way or the other. Becauſe ſpeculators in trade then know what ground to go upon. But it is not eaſy to collect with certainty from a general verdict, or from notes taken at *niſi prius*, what was the true ground of deciſion. Therefore in this as in all doubtful caſes, I wiſhed a caſe to be made for the opinion of the court.

It appeared on the former argument and now, that there are but three common law caſes relative to barratry. The firſt is *Knight* and *Cambridge*, *Strange* 581. where the neglect of the captain in not doing his duty, was adjudged barratry; for it was his duty to pay the port duties before the ſhip went out of port; and he being guilty of neglect in not diſcharging them, it was adjudged to amount to barratry.

The next is the caſe of *Stamma* verſus *Brown*; 2 *Str.* 1173, where the opinion of the chief juſtice in his direction to the jury is very ſtrong to the preſent caſe; the ſhip being chartered, and having taken goods on board for a voyage directed to *Marſeilles*, had paſſed by *Marſeilles*, and therefore went out of the voyage. The chief juſtice in his direction told the jury, that this being againſt the expreſs agreement to go firſt to *Marſeilles*, ſeemed not to be a ſimple deviation only, but a formed deſign to deceive

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ceive the contractor. The jury ſtayed out ſome time, and on their return aſked the chief juſtice, whether, if the maſter was to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places for the benefit of the owners, it would be barratry? The chief juſtice anſwered it would not. Whereupon the jury found a verdict for the defendant. Upon a motion for a new trial it was refuſed, becauſe it appeared to the court that notice had been given to the agent of the plaintiff, that the voyage was to be altered, and that he was at liberty to take his goods out of the ſhip, if he diſapproved of ſuch alteration; and to make it barratry, there muſt be ſomething of a criminal nature as well as a breach of contract.

The laſt common law caſe is, *Elton* verſus *Brogden*, 2 *Str.* 1264. In that caſe neither the terms of the firſt or ſecond policy are ſtated, and yet they muſt have been ſpecial. The only queſtion ſeems to have been, whether the capture of a *ſecond* prize juſtified the *ſecond* return of the ſhip to *Briſtol*. The court held it did: if ſo, there could be no barratry; becauſe the captain and mariners acted to the beſt of their judgment, for the *benefit* of the *owners*. Whatever excuſed the deviation, proved that the deviation could not be barratry. The circumſtances which induced the court to be of that opinion are not ſtated.

But theſe caſes do not afford any preciſe definition of what barratry is; therefore I wiſhed the cauſe to ſtand over to be argued by one counſel on a ſide. I have in the mean time conſidered of it, and conſulted with men converſant in mercantile affairs, and I am now very clear.

The firſt thing to be conſidered is, what is meant by barratry of the maſter. I take the word to have been originally introduced by the *Italians*, who were the firſt great traders of the modern world. In the *Italian Dictionary* the word "*Barratrare*" means to *cheat*, and whatſoever is by the maſter a cheat, a fraud, a cozening, or a trick, is barratry in him: nothing can be ſo general. Here the underwriter has inſured againſt all barratry of the maſter, and we are not now in a caſe of the owner or freighter being privy to it; if we were, nothing is ſo clear as that no man can complain of an act done, to which he himſelf is a party.

In the preſent caſe all relative to *Willes* may be laid out of it. He is originally the owner, but not the inſured here. *Darwin* was the freighter of the ſhip, and the goods that were on board were

were his: if any fraud is committed on the owner, it is committed on *Darwin*. The queſtion then is, What is the ground of complaint againſt the maſter? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* truſts he will ſet out immediately; inſtead of which the maſter goes on an iniquitous ſcheme, totally diſtinct from the purpoſe of the voyage to *Seville*: that is a cheat, and a fraud on *Darwin*, who thought he would ſet out directly; and whether the loſs happened in the act of barratry, that is, *during* the fraudulent voyage or *after*, is immaterial; becauſe the voyage is equally altered, even though there is no other iniquitous intent. But in the preſent caſe, there is a great deal of reaſon to ſay, that the loſs ſuſtained was in conſequence of the alteration of the voyage. The moment the ſhip was carried from its right courſe, it was barratry; and here the loſs was immediately upon it. Suppoſe the ſhip had been loſt *afterwards*, what would have been the caſe of the inſured, if not ſecured againſt the barratry of the maſter? He would have loſt his inſurance, by the fraud of the maſter; for it was clearly a deviation; and the inſured cannot come on the underwriters for a loſs, in conſequence of a deviation. Therefore I am clearly of opinion, this ſmuggling voyage was barratry in the maſter.

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ASTON, Juſtice.—I wonder that there ſhould remain a doubt at this time of day, what is meant by barratry in the maſter. In different ordinances different terms are uſed, but they all have the ſame meaning. In one of the ordinances of *Stockholm* it is called "*Knavery* of the maſters or mariners," and the facts ſtated in the preſent caſe clearly fall within that deſcription. Where it is a deviation with the conſent of the owner of the veſſel, and the maſter is not acting for his own private intereſt, in ſuch caſe it is nothing but a deviation with the conſent of the owner, and the underwriter is excuſed. In the preſent caſe the hulk of the ſhip belonged to *Willes*, but he had nothing to do with it, having chartered it to *Darwin*; the jury, therefore, did right to conſider *Darwin* as owner *pro hâc vice*. Having conſidered him in that light, the conduct of the maſter was clearly barratry. For he was acting for his own benefit, and without the conſent, or privity, or any intended good to his owner. Nobody knows when the firſt commencement of the injury happened; but moſt probably on the return of the ſhip to *Dartmouth* from *Guernſey*, where he had been for the purpoſe of ſmuggling. Therefore, I am clearly of opinion that this change of the voyage for an iniquitous purpoſe was barratry; which is not confined to the running

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ning away with the ſhip, but comprehends every ſpecies of fraud, knavery or criminal conduct in the maſter by which the owners or freighters are injured.

WILLES Juſtice concurred. The only doubt I had in this caſe was, when the loſs accrued; and I think it may reaſonably be ſaid to have happened in conſequence of the ſmuggling voyage: for if the ſhip had proceeded on her firſt intended courſe, ſhe would have eſcaped the ſtorm. Though this was a deviation, yet it is a juſt and fair rebutter to ſay, that it was barratry in the maſter, which is inſured againſt in the policy. I think the juſtice of the caſe is on the ſide of the plaintiffs, and therefore that there ought not to be a new trial.

ASHHURST Juſtice. I continue of the ſame opinion as I held at the trial: and I think the plaintiffs have a right to recover on either count in the declaration. *Firſt*, For the loſs at ſea. For it does not lie in the mouth of the inſurer to object on the ground of its being a deviation, and ſo prevent the plaintiffs from recovering on that count: becauſe the act of the maſter is a fraudulent act; and if the loſs is conſequential upon ſuch fraudulent act, it is barratry againſt which the party is inſured: and therefore the inſurers ſhall not object upon a fact which is itſelf a forfeiture of the policy.

Secondly, I think, for the reaſons already alleged by my Lord Chief Juſtice, and my Brethren, that it may fairly be ſaid, the loſs accrued in conſequence of the barratry of the maſter. Therefore I concur that the rule ſhould be diſcharged.

Mr. Juſtice *Willes* agreed with Mr. Juſtice *Aſhhurſt* that the plaintiffs were entitled to recover on either count.

Rule for a new trial diſcharged.

Saturday Nov. 12th.

KENYON and others *verſus* LEVI SOLOMON.

One who was a bankrupt came from *Holland* with intent to ſurrender himſelf

A Motion had been made to diſcharge the defendant out of cuſtody, as having been arreſted in coming to ſurrender himſelf as a bankrupt. The motion was grounded upon the ſtatute 5 *Geo.* 2. *c.* 30. *ſect.* 5. which enacts "that a bankrupt

on the *forty-ſecond* day: but hearing his time was enlarged, reſolved not to ſurrender till the *enlarged* day. In the mean time he was arreſted; and the court held he ſhould not be diſcharged. For, till actual ſurrender, the ſtatute 5 *Geo.* 2. *c.* 30. meant to protect a bankrupt only during ſuch time as it might be reaſonable and convenient for him to come in and ſubmit himſelf to the commiſſion.

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" ſhall be free from arreſts, *in coming to ſurrender*, and from actual " ſurrender for the forty-two days, or ſuch further time as ſhall " be allowed for finiſhing his examination."

The caſe as it appeared upon the defendant's own affidavit was as follows; that he came from *Holland* to *England* within the 42 days, with intent to ſurrender himſelf upon the 42d day: but finding that his time for ſurrendering himſelf had been enlarged to a further day, he then laid aſide his deſign of ſurrendering himſelf upon the 42d day, and did not mean to ſurrender himſelf till the enlarged day. In the intermediate time, he was arreſted by one of his creditors. The queſtion was, Whether he was privileged by this ſtatute, as " a bankrupt coming to " ſurrender himſelf?"

Upon ſhewing cauſe this day, Mr. *Dunning* argued that he was: Mr. *Wallace* and Mr. *Lucas* that he was not.

Lord MANSFIELD.—Nothing can be plainer than this caſe. The act allows a bankrupt 42 days to ſurrender in; but the ſooner he ſurrenders the better for the creditors. Therefore, to induce bankrupts to ſurrrender, a privilege is held out to them by *ſtat.* 5 *Geo.* 2. *c.* 30. namely, " that in coming to ſurrender, they " ſhall be free from arreſt, and alſo after actual ſurrender for the " ſpace of 42 days, or ſuch further time as ſhall be allowed for " finiſhing their laſt examination." But this is a *particular* privilege to enable them to ſurrender; and till actual ſurrender confined to the act of their going *with that view*; not a *general* privilege during the whole time which the act of Parliament allows them to ſurrender in. Nevertheleſs, if a bankrupt be abroad as this man was, and upon his return with an intention to ſurrender, is arreſted on his landing, or within a day or two after his arrival, before he can conveniently make his ſurrender, it would be too rigorous a conſtruction of the ſtatute to ſay, he ſhall not have a reaſonable time in which to execute ſuch intention; becauſe in fact he is on his way to ſurrender. But here the bankrupt, inſtead of ſurrendering on his arrival, ſwears he had no intention of doing ſo till the laſt moment of the time allowed him for finiſhing his laſt examination. There is no pretence, therefore, for ſaying he is within the privilege of being free from arreſts in coming to ſurrender; which muſt be confined, like the caſe of witneſſes arreſted in attending the court, to a reaſonable time *eundi et redeundi*; and beyond that the privilege does not extend.

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ASTON, Juſtice.—There is no ground or pretence for the defendant being diſcharged. Inſtead of ſurrendering himſelf in a reaſonable time after his arrival, he wilfully delays to ſurrender himſelf: and the meaning of the legiſlature was not to protect bankrupts, who withhold themſelves from their creditors during the whole length of time allowed for their ſurrender; but thoſe only who are active in ſubmitting themſelves to the ſeveral ſtatutes concerning bankrupts as ſoon as conveniently may be. Therefore I am clearly of opinion the defendant is not entitled to his diſcharge. Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Per. Cur. Rule diſcharged.

Monday, Nov. 14th.

Lord *Mansfield* abſent.

NUNCOMAR *verſus* BURDETT.

MR. *Willes* moved that proceedings might be ſtaid till ſecurity ſhould be given to the defendant for his coſts, in caſe of the plaintiff's failing of ſucceſs; as the plaintiff's reſidence was in the *Eaſt Indies*, at *Calcutta* in *Bengal*.

ASTON, Juſtice.—It is every day refuſed. I have many notes of its being ſo.

Take nothing by the motion.

Tueſday, Nov. 15th.

One having by will deviſed all the *reſidue* of his eſtate of what kind or quality ſoever to *W. P. afterwards* purchaſes *copyhold* lands, and ſurrenders them "to ſuch "uſes as he "*ſhall* by "his laſt "will de- "clare, li- "mit, and "appoint." He *afterwards* makes a *codicil*, and thereby *ratifies and confirms all and every the gifts*, deviſes and bequeſts in his ſaid will, except what he had altered by the codicil; and deſires the *codicil* may be annexed to, and taken as part of his will to all intents and purpoſes.—This amounts to a *republication* of his will ſo as to make the after purchaſed copyhold lands paſs by the reſiduary deviſe.

DOE ex dim. PATE *verſus* DAVY.

IN ejectment brought for the recovery of certain premiſes in the manor of *Hampſtead* in the county of *Middleſex*; the jury found a verdict for the plaintiff, ſubject to the opinion of the court upon the following caſe.

That *William Davy* by his will dated the 2d of *April* 1767, duly atteſted by three witneſſes, after ſeveral legacies bequeathed to particular perſons, made the following reſiduary deviſe, "And "as to *all the reſt and reſidue* of my eſtate, of what nature, kind "and quality ſoever, I give, deviſe and bequeath the ſame unto "my ſaid brother *William Pate*, his heirs, executors and adminiſtrators, according to the nature of the reſpective eſtates." On the 16th of *May* 1768, the teſtator purchaſed a *cuſtomary* meſſuage ſituate in *Hampſtead*, to which he was admitted in fee; and afterwards ſurrendered it as follows: "To ſuch uſes, intents,

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" and purpoſes as he the ſaid *William Davy ſhall* by his laſt will " and teſtament in writing thereof direct, limit, and appoint." On the 8th of *May* 1769 the teſtator purchaſed and was admitted to another piece of land, and ſurrendered it in the ſame manner. On the 18th of *Nov.* 1769, he made a codicil duly atteſted by three witneſſes; by which reciting, that he had by his will deviſed all his fee-farm rents in manner there mentioned, he deviſed the ſame to *Catharine Davy*, widow of his brother *John Davy*, and her aſſigns, during her natural life, together with his houſe, furniture, coach, &c. and then proceeds as follows; " *I do* " *hereby ratify and confirm all and every the gifts, deviſes, and bequeſts* " *contained in my ſaid will, except what I have hereby altered*; and " *I do deſire that this preſent writing may be annexed to and accepted* " *and taken as a codicil to my will to* ALL INTENTS AND PUR- " POSES." At the date of the will the teſtator had no copyhold lands; but at the date of the codicil he had the copyhold lands before mentioned. The queſtion was, Whether the copyhold lands paſſed to the plaintiff by the will?

Mr. *Lee* for the plaintiff.—The copyhold lands do paſs. *Firſt*, If they had been purchaſed antecedent to the date of the will, the reſiduary deviſe, though ſilent as to copyhold lands, would have included them; for it has been decided, that copyhold lands paſs by a deviſe of all the teſtator's real eſtate. *Ackerley* v. *Vernon*, 9 *Mod.* 75. The only queſtion then is, Whether the execution of the codicil, ſubſequent to the purchaſe and ſurrender of the copyhold eſtates, amounts to ſuch a republication of the will, as to paſs them? It clearly does; becauſe no preciſe form of words is neceſſary; but any which denote the continuance of the teſtator's mind, are ſufficient. Here the codicil has an expreſs reference to the will, and in terms ratifies and confirms every gift in it.

In *Heylin* v. *Heylin* * argued in this court laſt term, it was adjudged, that the circumſtance of a teſtator's expunging a legacy, coupled with an intermediate purchaſe and ſurrender of copyhold lands to the uſes of his will, amounted to a republication ſo as to paſs ſuch newly purchaſed copyhold lands. In *Potter* v. *Potter*, 1 *Ves.* 438. the teſtator by a ſecond codicil, on a ſeparate piece of paper, and without date, revoked ſo much of his will as ſhould be found to be inconſiſtent with ſuch codicil, and confirmed the reſt. It was held by Sir *J. Strange* Maſter of the Rolls, that this latter codicil was a republication, ſo as to paſs lands only contracted for at the date of the teſtator's will under

* *ante*, 130.

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the general words contained in the will, even if they had not paſſed before; which, however, *his Honour* inclined to think they had.

Here the teſtator directs the codicil to be annexed to his will: clearly, therefore, it is a republication; and conſequently the after purchaſed copyhold lands paſs under the general reſiduary deviſe.

Mr. *Manſfield* for the defendant. The copyhold lands deſcend to the heir at law. At the date of the will the teſtator had no copyhold eſtate: clearly therefore he had no intention to paſs any copyhold eſtate to the deviſee. He afterwards purchaſes the copyholds in queſtion, and ſurrenders them "to ſuch uſes as "he *ſhall* declare by his laſt will;" not to the uſes "*declared* "or to be *declared* by his laſt will," as was the caſe of *Heylin* v. *Heylin*; and the ground upon which that caſe was decided; namely, that it was a republication by reference to uſes *already* declared by a will then exiſting. He then makes a codicil, whereby he ratifies and confirms every gift in his will, except what he had particularly altered by it. This is a ratification only of what he had before expreſsly given by his will, and nothing elſe. But the will contains no gift or deviſe of any *copyhold* lands, nor does the codicil refer to any. On the contrary, it is clear that the only object the teſtator had, in adding the codicil, was, to make the particular alteration there mentioned; conſequently the copyhold lands are undiſpoſed of, and the heir at law is entitled to them by deſcent.

Mr. *Lee* was going to reply: But Lord *Manſfield* aſked him, if he had ſeen the caſe of *Acherley* v. *Vernon*, as reported in *Comyn* 383. where the teſtator by a codicil, reciting, that he had made his ſaid will, adds "I hereby ratify and confirm my "ſaid will, except in the alterations aftermentioned;" and Lord Chancellor *Macclesfield* decreed, that the will was confirmed by the codicil; that the teſtator ſigning and publiſhing his codicil in the preſence of three witneſſes was a republication of his will, and both together made but one will; and by the ſaid will and codicil his fee-farm rents, and aſſart rents purchaſed after the will did well paſs. Lord *Manſfield* ſaid this caſe was deciſive of the queſtion.

Aſton Juſtice. It is an authority exactly in point. Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Per cur. Let the *Poſtea* be delivered to the plaintiff.

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Tuesday, Nov. 24th.

Trespass and false imprisonment lies in *England* by a native *Minorquin*, against a governor of *Minorca*, for such injury committed by him in *Minorca*.

ON the 8th of *June*, in last term, Mr. Justice *Gould* came personally into court, to acknowledge his seal affixed to a bill of exceptions in this case; and errors having been assigned thereupon, they were now argued.

This was an action of trespass, brought in the Court of *Common Pleas* by *Anthony Fabrigas* against *John Mostyn*, for an assault and false imprisonment; in which the plaintiff declared, that the defendant on the *first* of *September*, in the year 1771, with force and arms, *&c.* made an assault upon the said *Anthony*, at *Minorca*, (to wit) at *London* aforesaid, in the parish of St. *Mary le Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, (to wit) for the space of *ten months*, without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said *Anthony*, and compelled him to depart from *Minorca* aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said *Anthony* from *Minorca* aforesaid, to *Carthagena*, in the dominions of the King of *Spain*, &c. to the plaintiff's damage of 10,000 *l.*

The defendant pleaded 1st. Not guilty; upon which issue was joined. 2dly. A special justification, that the defendant at the time, *&c.* and long before, was *governor* of the said island of *Minorca*, and during all that time was invested with, and did exercise all the powers, privileges, and authorities, civil and military, belonging to the government of the said island of *Minorca*, in parts beyond the seas; and the said *Anthony*, before the said time when, *&c.* (to wit) on the said *first* of *September*, in the year aforesaid, at the island of *Minorca* aforesaid, was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants of the said island, in breach of the peace: whereupon the said *John* so being governor of the said island of *Minorca* as aforesaid, at the said time, when, *&c.* in order to preserve the peace and government of the said island, was obliged to, and did then and there order the said *Anthony* to be banished from the said island of *Minorca*; and in order to banish the said *Anthony*, did then and there gently lay hands upon the said *Anthony*, and did then and there seize and arrest him, and did

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keep and detain the ſaid *Anthony*, before he could be baniſhed from the ſaid iſland, for a ſhort ſpace of time, (to wit) for the ſpace of ſix days, then next following; and afterwards, to wit, on the 7th of *September*, in the year aforeſaid, at *Minorca* aforeſaid, did carry, and cauſe to be carried, the ſaid *Anthony*, on board a certain veſſel, from the iſland of *Minorca* aforeſaid, to *Carthagena* aforeſaid, as it was lawful for him to do, for the cauſe aforeſaid; which are the ſame making the ſaid aſſault upon the ſaid *Anthony*, in the firſt count of the ſaid declaration mentioned, and beating, and ill-treating him, and impriſoning him, and keeping and detaining him in priſon for the ſaid ſpace of time, in the ſaid firſt count of the ſaid declaration mentioned, and compelling the ſaid *Anthony* to depart from *Minorca* aforeſaid, and carrying and cauſing to be carried the ſaid *Anthony* from *Minorca* to *Carthagena*, in the dominions of the King of *Spain*, whereof the ſaid *Anthony* has above complained againſt him, and this he is ready to verify; wherefore he prays judgment, *&c.* without this, that the ſaid *John* was guilty of the ſaid treſpaſs, aſſault, and impriſonment, at the pariſh of St. *Mary le Bow*, in the ward of *Cheap*, or elſewhere, *out* of the ſaid iſland of *Minorca* aforeſaid. *Replication de injuria ſuâ propriâ abſq. tali cauſâ.* At the trial the jury gave a verdict for the plaintiff, upon both iſſues, with 3000 *l.* damages, and 90 *l.* coſts.

The ſubſtance of the evidence, as ſtated by the bill of exceptions, was as follows: On behalf of the *plaintiff*, that the defendant, at the iſland of *Minorca* on the 17th of *September* 1771, ſeized the plaintiff, and, without any trial, impriſoned him for the ſpace of ſix days againſt his will, and baniſhed him for the ſpace of twelve months from the ſaid iſland of *Minorca* to *Carthagena* in *Spain*. On behalf of the *defendant*; that the plaintiff was a *native* of *Minorca*, and at the time of ſeizing, impriſoning, and baniſhing him as aforeſaid, was an inhabitant of and reſiding in the *Arraval* of St. *Phillip*'s, in the ſaid iſland; that *Minorca* was ceded to the Crown of *Great Britain*, by the treaty of *Utrecht*, in the year 1713. That the *Minorquins* are in general governed by the *Spaniſh* laws, but when it ſerves their purpoſe plead the *Engliſh* laws; that there are certain magiſtrates, called *the chief juſtice criminal*, and *the chief juſtice civil*, in the ſaid iſland: that the ſaid iſland is divided into four diſtricts, excluſive of the *Arraval* of St. *Phillip*'s; which the witneſs always underſtood to be ſeparate and diſtinct from

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the others, and under the immediate order of the governor; ſo that no magiſtrate of *Mahon* could go there to exerciſe any function, without leave firſt had from the governor: that the *Arraval* of St. *Phillip*'s is ſurrounded by a line wall on one ſide, and on the other by the ſea, and is called the *Royalty*, where the governor has greater power than any where elſe in the iſland; and where the judges cannot interfere but by the governor's conſent; that nothing can be executed in the *Arraval but by the governor's leave*, and the judges have applied to him the witneſs, for the governor's leave to execute proceſs there. That for the trial of murder and other great offences committed within the ſaid *Arraval*, upon application to the governor, he generally appoints the *aſſeſſeur criminal* of *Mahon*, and for leſſer offences, the *muſtaſtaph*; and that the ſaid *John Moſtyn*, at the time of the ſeizing, impriſoning, and baniſhing the ſaid *Anthony*, was the governor of the ſaid iſland of *Minorca*, by virtue of certain letters patent of his preſent Majeſty. Being ſo governor of the ſaid iſland, he cauſed the ſaid *Anthony* to be ſeized, impriſoned, and baniſhed, as aforeſaid, without any reaſonable or probable cauſe, or any other matter alleged in his plea, or any act tending thereto.

This caſe was argued this term, by Mr. *Buller*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards, in *Hilary Term* 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glynn*, for the defendant.

For the plaintiff in error. There are two queſtions, 1ſt, Whether in any caſe an action can be maintained in this country for an impriſonment committed at *Minorca*, upon a native of that place?

2dly. Suppoſing an action will lie againſt any other perſon, Whether it can be maintained againſt the governor, acting as ſuch, in the peculiar diſtrict of the *Arraval* of St. *Phillip*'s?

In the diſcuſſion of both theſe queſtions, the conſtitution of the iſland of *Minorca*, and of the *Arraval* of St. *Phillip*'s, are material. Upon the record it appears, that by the treaty of *Utrecht*, the inhabitants had their own property and laws preſerved to them. The record further ſtates, that the *Arraval* of St. *Phillip*'s, where the preſent cauſe of action aroſe is *ſubject* to the immediate *controul* and order of the *governor only*, and that no judge of the iſland can execute any function there, without the particular leave of the governor for that purpoſe. 1ſt. If that be ſo, and the *Lex Loci* differs from the law of this coun-

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try; the *Lex Loci* muſt decide, and not the law of this country. The caſe of *Robinſon* verſus *Bland*, 2 *Bur.* 1078. does not interfere with this poſition; for the doctrine laid down in that caſe is, that where a tranſaction is entered into between *Britiſh* ſubjects, with a view to the law of *England*, the law of the *place* can never be the rule which is to govern. But where an act is done, as in this caſe, which by the law of *England* would be a crime, but in the country where it is committed, is no crime at all, the *Lex Loci* cannot be the rule. It was ſo held by Lord C. J. *Pratt*, in the caſe of *Pons* verſus *Johnſon*, and in a like caſe of *Balliſter* verſus *Johnſon*, ſittings after *Trinity* term 1765.

2d. In criminal caſes, an offence committed in foreign parts, cannot, except by particular ſtatutes, be tried in this country. 1ſt. *Vezey*, 246. The *Eaſt India Company* verſus *Campbell*. If crimes committed abroad cannot be tried here, much leſs ought civil injuries, becauſe the latter depend upon the police and conſtitution of the country where they occur, and the ſame conduct may be actionable in one country, which is juſtifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of moſt countries take for their baſis the law of God, and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of diſtributing equal juſtice in ſuch caſes than in civil actions. In *Keilwey*, 202. it was held that the Court of *Chancery* cannot entertain a ſuit for dower in the *Iſle of Man*, though it is part of the territorial dominions of the crown of *England*. 3d. The caſes where the courts of *Weſtminſter* have taken cognizance of tranſactions ariſing abroad, ſeem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of *England*, and between *Engliſh* ſubjects; and even there it is done by a legal fiction; namely, by ſuppoſing under a *videlicet*, that the cauſe of action did ariſe within this country, and that the place abroad, lay either in *London* or in *Iſlington*. But where it appears upon the face of the record, that the cauſe of action did ariſe in foreign parts, there it has been held that the court has no juriſdiction. 2 *Lutw.* 946. Aſſault and falſe impriſonment of the plaintiff, at *Fort St. George*, in the *Eaſt Indies*, in parts beyond the ſeas; *viz.* at *London*, in the pariſh of St. *Mary le Bow*, in the ward of *Cheap*. It was reſolved, by the whole court, that the declaration was ill, becauſe the treſpaſs

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paſs is ſuppoſed to be committed at *Fort St. George*, in parts beyond the ſeas, *videlicet*, in *London*; which is repugnant and abſurd: and it was ſaid, by the chief juſtice, that if a bond bore date at *Paris*, in the kingdom of *France*, it is not triable here. In the preſent caſe, it does appear upon the record, that the offence complained of was committed in parts beyond the ſeas, and the defendant has concluded his plea with a traverſe, that he was not guilty in *London*, in the pariſh of *St. Mary le Bow*, or elſewhere, *out* of the iſland of *Minorca*. Beſides, it ſtands admitted by the plaintiff; becauſe if he had thought fit to have denied it, he ſhould have made a new aſſignment, or have taken iſſue on the place. Therefore as Juſtice *Dodderidge* ſays, in *Latch* 4. the court muſt take notice, that the cauſe of action aroſe out of their juriſdiction.

Before the ſtatute of *Jeofails*, even in caſes the moſt tranſitory, if the cauſe of action was laid in *London*, and there was a local juſtification, as at *Oxford*, the cauſe muſt have been tried at *Oxford*, and not in *London*. But the ſtatute of *Jeofails* does not extend to *Minorca*: therefore this caſe ſtands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining ſuch an action in this country are many, but none can attend the rejecting it. For it muſt be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the higheſt injuſtice, by making a man who has regulated his conduct by one law, amenable to another totally oppoſite. If by the law of *Minorca*, how is it to be proved? There is no legal mode of certifying it, no proceſs to compel the attendance of witneſſes, nor means to make them anſwer. The conſequence would be to encourage every diſaffected or mutinous ſoldier to bring actions againſt his officer, and to put him upon his defence without the power of proving either the law or the facts of his caſe.

II. Point. If an action would lie againſt any other perſon, yet it cannot be maintained againſt the Governor of *Minorca*, acting as ſuch, within the *Arraval* of St. *Phillip*'s.

The Governor of *Minorca*, at leaſt within the diſtrict of St. *Phillip*'s, is abſolute: both the civil and criminal juriſdiction veſt in him as the *ſupreme power*, and as ſuch he is accountable to none but God. But ſuppoſing he were not abſolute, in this caſe, the act complained of was done by him in a judicial ca-

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Mr. *Peckham,* for the defendant in error. 1ſt. The objection to the juriſdiction is now too late; for wherever a party has once ſubmitted to the juriſdiction of the court, he is for ever after precluded from making any objection to it. *Year book* 22. *H.* 6. *fol.* 7. *Co. Litt.* 127. *b. T. Raym.* 34. 1 *Mod.* 81. 2 *Mod.* 273. 2 Lord *Raym.* 884. 2 *Vern.* 483.

Secondly, An action of treſpaſs can be brought in *England* for an injury done abroad. It is a tranſitory action, and may be brought any where. *Co. Litt.* 282. 12 *Co.* 114. *Co. Litt.* 261. *b.* where Lord *Coke* ſays, that an obligation made beyond ſeas, at *Bourdeaux* in *France,* may be ſued here in *England,* in what place the plaintiff will. Captain *Parker* brought an action of treſpaſs and falſe impriſonment againſt Lord *Clive* for injuries received in *India,* and it was never doubted but that the action did lie. And at this time there is an action depending between *Gregory Cojimaul,* an *Armenian* merchant, and Governor *Verelſt,* in which the cauſe of action aroſe in *Bengal.* A bill was filed by the Governor in the Exchequer for an injunction, which was granted:

granted; but on appeal to the Houſe of Lords, the injunction was diſſolved; therefore the ſupreme court of judicature, by diſſolving the injunction, acknowledged that an action of treſpaſs could be maintained in *England*, though the cauſe of action aroſe in *India*.

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Thirdly, There is no diſability in the plaintiff which incapacitates him from bringing this action. Every perſon born within the ligeance of the King, though without the realm, is a natural born ſubject, and as ſuch, is entitled to ſue in the King's courts. *Co. Lit.* 129. The plaintiff, though born in a conquered country, is a ſubject, and within the ligeance of the King. 2 *Burr.* 858.

In 1 *Salk.* 404. upon a bill to foreclоſe a mortgage in the iſland of *Sarke*, the defendants pleaded to the juriſdiction, *viz.* that the iſland was governed by the laws of *Normandy*, and that the party ought to ſue in the courts of the iſland, and appeal. But Lord Keeper *Wright* overruled the plea; "otherwiſe there "might be a failure of juſtice if the chancery could not hold "plea in ſuch caſe, the party being here." In this caſe both the parties are upon the ſpot. In the caſe of *Ramkiſſenſeat* v. *Barker*, upon a bill filed againſt the repreſentatives of the Governor of *Patna*, for money due to him as his Banyan; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and, therefore, could have no ſuit here. But Lord *Hardwicke* ſaid, "as the plaintiff's was a mere perſonal demand, it was "extremely clear that he might bring a bill in this court;" and he overruled the defendant's plea without hearing one counſel on the other ſide.

The caſe of the Counteſs of *Derby*, *Keilwey*, 202, does not affect the preſent queſtion; for that was a claim of dower, which is a *local* action, and cannot, as a tranſitory action, be tried anywhere. The other caſes from *Latch* and *Lutwyche*, were either local actions, or queſtions upon demurrer; therefore not applicable to the caſe before the court; for a party may avail himſelf of many things upon a demurrer, which he cannot by a writ of error. The true *diſtinction* is between *tranſitory* and *local* actions; the former of which may be tried any where; the latter cannot, and this is a tranſitory action. But there is one caſe which more particularly points out the diſtinction, which is the caſe of Mr. *Skinner*, referred to the twelve judges from the council board. In the year 1657, when trade was open to the *Eaſt Indies*, he poſſeſſed himſelf of a houſe and warehouſe, which he filled

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with goods at *Jamby*, and he purchaſed of the King at *Great Jamby* the iſlands of *Baretha*. The agents of the *Eaſt India* Company *aſſaulted his perſon*, ſeiſed his warehouſe, *carried away his goods*, and took and *poſſeſſed* themſelves of the *Iſlands* of *Baretha*. Upon this caſe it was propounded to the judges, by an order from the King in council, dated the 12th *April*, 1665, "Whether Mr. *Skinner* could have a full relief in any ordinary "court of law?" Their opinion was, "That his Majeſty's ordi- "nary courts of juſtice at *Weſtminſter* can give relief for taking "away and ſpoiling his ſhip, goods and papers, and aſſaulting "and wounding his perſon, notwithſtanding the ſame was done "beyond the ſeas. But that as to the detaining and *poſſeſſing* of "the *houſe* and *iſlands* in the caſe mentioned, he is not relievable "in any ordinary court of juſtice." It is manifeſt from this caſe that the twelve judges held, that an action might be maintained here for ſpoiling his goods, and ſeizing his perſon, becauſe an action of treſpaſs is a *tranſitory* action; but an action could not be maintained for poſſeſſing the houſe and land, becauſe it is a *local* action.

4th. point. It is contended that General *Moſtyn* governs as all abſolute ſovereigns do, and that *ſtet pro ratione voluntas* is the only rule of his conduct. From whom does the Governor derive this deſpotiſm? Not from the King, for the King has no ſuch power, and, therefore, cannot delegate it to another. Many caſes have been cited and much argument has been adduced, to prove that a man is not reſponſible in an action for what he has done as a judge; and the caſe of *Dutton* v. *Howell* has been much dwelt upon; but that caſe has not the leaſt reſemblance to the preſent. The ground of that deciſion was, that Sir *John Dutton* was acting with his council in a judicial capacity, in a matter of public accuſation, and agreeable to the laws of *Barbadoes*, and only let the law take its courſe againſt a criminal. But Governor *Moſtyn* neither ſat as a military or as civil judge; he heard no accuſation, he entered into no proof; he did not even ſee the priſoner; but in direct oppoſition to all laws, and in violation of the firſt principles of juſtice, followed no rule but his own arbitrary will, and went out of his way to perſecute the innocent. If that be ſo, he is reſponſible for the injury he has done: and ſo was the opinion of the court of *C. B.* as delivered by Lord Chief Juſtice *De Grey* on the motion for a new trial. If the Governor had ſecured him, ſaid his Lordſhip, nay, if he had barely committed him, that he might have been amenable to juſtice;

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juſtice; and if he had immediately ordered a proſecution upon any part of his conduct, it would have been another queſtion; but the governor knew he could no more impriſon him for a twelvemonth (and the baniſhment for a year is a continuation of the original impriſonment) than that he could inflict the torture. Lord *Bellamont*'s caſe, 2 *Salk.* 625. *Paſ.* 12 *W.* 3. is a caſe in point to ſhew that a governor abroad is reſponſible here: and the *ſtat.* 12 *W.* 3. paſſed the ſame year for making governors abroad amenable here in *criminal* caſes, affords a ſtrong inference that they were already anſwerable for *civil* injuries, or the legiſlature would at the ſame time have provided againſt that miſchief. But there is a late deciſion not diſtinguiſhable from the caſe in queſtion, *Comyn* v. *Sabine*, governor of *Gibraltar*, *Mich.* 11 *Geo.* 2. The declaration ſtated, that the plaintiff was a maſter carpenter of the office of ordnance at *Gibraltar*, that governor *Sabine* tried him by a court martial to which he was not ſubject, that he underwent a ſentence of 500 laſhes; and that he was compelled to depart from *Gibraltar*, which he laid to his damage of 10,000 *l.* The defendant pleaded not guilty, and juſtified under the ſentence of the court martial. There was a verdict for the plaintiff, with 700 *l.* damages. A writ of error was brought, but the judgment affirmed.

With reſpect to the *Arraval* of St. *Philip*'s being a peculiar diſtrict under the immediate authority of the governor alone, the opinion of Lord Chief Juſtice *de Grey* upon the motion for a new trial is a complete anſwer: "One of the witneſſes in the "cauſe (ſaid his Lordſhip) repreſented to the jury, that in ſome "particular caſes, eſpecially in criminal matters, the governor "reſident upon the iſland does exerciſe a legiſlative power. It "was groſs ignorance in that perſon to imagine ſuch a thing; I "may ſay it was impoſſible, that a man who lived upon the "iſland in the ſtation he had done, ſhould not know better, "than to think that the governor had a civil and criminal power "in him. The governor is the king's ſervant; his commiſſion "is from him, and he is to execute the power he is inveſted with "under that commiſſion; which is, to execute the laws of "*Minorca*, under ſuch regulations as the King ſhall make in "council. It was a vain imagination in the witneſſes to ſay, "that there were five terminos in the iſland of *Minorca*; I have "at various times, ſeen a multitude of authentic documents "and papers relative to that iſland, and I do not believe that in "any one of them, the idea of the *Arraval* of St. *Phillip's* being "a diſtinct

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" a diſtinct juriſdiction, was ever ſtarted. *Mahon* is one of the " four terminos, and St. *Philip's* and all the diſtrict about it, " is comprehended within that termino; but to ſuppoſe that there " is a diſtinct juriſdiction, ſeparate from the government of the " iſland, is ridiculous and abſurd." Therefore, as the defendant by pleading in chief, and ſubmitting his cauſe to the deciſion of an *Engliſh* jury, is too late in his objection to the juriſdiction of the court; as no diſability incapacitates the plaintiff from ſeeking redreſs here; and as the action which is a tranſitory one is clearly maintainable in this country, though the cauſe of action aroſe abroad, the judgment ought to be affirmed. Should it be reverſed, I fear the public, with too much truth, will apply the lines of the Roman Satyriſt on the drunken *Marius* to the preſent occaſion; and they will ſay of governor *Moſtyn*, as was formerly ſaid of him,

Hic eſt damnatus inani judicio;

and to the *Minorquins*, if Mr. *Fabrigas* ſhould be deprived of that ſatisfaction in damages which the jury gave him,

At tu victrix provincia ploras.

Lord MANSFIELD.—Let it ſtand for another argument. It has been extremely well argued on both ſides.

On *Friday* 27th *January*, 1775, it was very ably argued by Mr. Serjeant *Glynn*, for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

Lord MANSFIELD.—This is an action brought by the plaintiff againſt the defendant, for an aſſault and falſe impriſonment; and part of the complaint made being for baniſhing him from the Iſland of *Minorca* to *Carthagena* in *Spain*, it was neceſſary for the plaintiff, in his declaration, to take notice of the real place where the cauſe of action aroſe: therefore, he has ſtated it to be in *Minorca*; with a *videlicet*, at *London*, in the pariſh of St. *Mary le bow*, in the ward of *Cheap*. Had it not been for that particular requiſite, he might have ſtated it to have been in the County of *Middleſex*. To this declaration the defendant put in two pleas. *Firſt*, " not guilty;" *ſecondly*, that he was governor of *Minorca* by letters patent from the crown; that the plaintiff was raiſing a ſedition and mutiny; and that in conſequence of ſuch ſedition and mutiny, he did impriſon him, and ſend him out of the iſland; which as governor, being inveſted with all the privileges, rights, *&c.* of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a juſtification in caſe it were true: but he denies the truth of the *fact*, and puts in iſſue whether the

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fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of *Minorca*, *out* of the realm of *England*, and no where else. To this the plaintiff has made no new assignment, and therefore by his replication he *admits* the *locality* of the cause of action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but on behalf of the defendant, evidence different from the facts alleged in this plea of justification was given, to shew that the *Arraval* of *St. Phillips*, where the injury complained of was done, was not within either of the four precincts, but is a district of itself more immediately under the power of the governor; and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case the judge left it to the jury, who found a verdict for the plaintiff, with 3,000*l.* damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us: and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the court.

If I understand the counsel for governor *Mostyn* right, what they say is this: The plea of not guilty is totally immaterial; and so is the plea of justification: because upon the plaintiff's own shewing it appears, 1st, that the cause of action arose in *Minorca*, *out* of the realm; 2dly, that the defendant was governor of *Minorca*, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued, that the judge who tried the cause ought to have refused any evidence whatsoever, and to have directed the jury to find for the defendant: and three reasons have been assigned. One, insisted upon in the former argument, was, that the plaintiff, being a *Minorquin*, is incapacitated from bringing an action in the King's courts in *England*. To dispose of that objection at once, I shall only say, it is wisely abandoned to day; for it is impossible there ever could exist a doubt, but that a subject born in *Minorca* has as good a right to appeal to the King's courts of justice, as one who is born within the sound of *Bow* bell: and the objection made in this case, of its not being stated on the record that the plaintiff was born since the treaty of *Utrecht*, makes no difference. The two other grounds are, 1st. That the defendant being *governor* of *Minorca*, is answerable for no injury whatsoever done by him in that capacity. 2dly, That the injury being done at *Minorca*, *out* of the realm, is not

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not cognizable by the King's courts in *England*.—As to the firſt, nothing is ſo clear as that to an action of this kind the defendant if he has any juſtification muſt plead it; and there is nothing more clear, than that if the court has not a *general juriſdiction* of the ſubject-matter, he muſt *plead* to the *juriſdiction*, and cannot take advantage of it upon the *general iſſue*. Therefore by the law of *England*, if an action be brought againſt a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete juſtification. So in this caſe, if the injury complained of had been done by the defendant as a judge, though it aroſe in a foreign country where the technical diſtinction of a court of record does not exiſt, yet ſitting as a judge in a court of juſtice, ſubject to a ſuperior review, he would be within the reaſon of the rule which the law of *England* ſays ſhall be a juſtification; but then it muſt be pleaded. Here no ſuch matter is pleaded, nor is it even in evidence that he ſat as judge of a court of juſtice. Therefore I lay out of the caſe every thing relative to the *Arraval* of *St. Phillip's*.

The firſt point then upon this ground is, the *ſacredneſs* of the defendant's perſon as *governor*. If it were true that the law makes him that ſacred character, he muſt plead it and ſet forth his commiſſion as ſpecial matter of juſtification; becauſe *primâ facie* the court has juriſdiction. But I will not reſt the anſwer upon that only. It has been inſiſted by way of diſtinction, that ſuppoſing an action will lie for an injury of this kind committed by one individual againſt another, in a country beyond the ſeas, but within the dominion of the crown of *England*, yet it ſhall *not emphatically* lie againſt the governor. In anſwer to which I ſay, that for many reaſons, if it did not lie againſt any other man, it ſhall *moſt emphatically* lie againſt the *governor*.

In every plea to the juriſdiction, you muſt ſtate another juriſdiction; therefore, if an action is brought here for a matter ariſing in *Wales*, to bar the remedy ſought in this court, you muſt ſhew the juriſdiction of the court of *Wales*; and in every caſe to repel the juriſdiction of the King's court, you muſt ſhew a more proper and more ſufficient juriſdiction: for if there is no other mode of trial, that alone will give the King's courts a juriſdiction. Now in this caſe no other juriſdiction is ſhewn, even ſo much as in argument. And if the King's courts of juſtice cannot hold plea in ſuch caſe, no other court can do it. For it is truly ſaid that a governor is in the nature of a viceroy; and therefore *locally, during his government*, no civil or criminal action will lie againſt

him: the reaſon is becauſe upon proceſs he would be ſubject to impriſonment. But here, the injury is ſaid to have happened in the *Arraval* of *St. Phillip's*, where without his leave no juriſdiction can exiſt. If that be ſo, there can be no remedy whatſoever, if it is not in the King's courts: becauſe when he is out of the government, and is returned with his property into this country, there are not even his effects left in the iſland to be attached. 1774. MOSTYN verſus FABRIGAS.

Another very ſtrong reaſon, which was alluded to by Mr. Serjeant *Glynn*, would alone be deciſive; and it is this: that though the charge brought againſt him is for a *civil* injury, yet it is likewiſe of a *criminal* nature; becauſe it is in *abuſe* of the authority delegated to him by the *King's Letters Patent*, under the great ſeal. Now if every thing committed within a dominion is triable by the courts within that dominion, yet the effect or extent of the *King's Letters Patent*, which gave the authority, can only be tried in the King's courts; for no queſtion concerning the Seignory, can be tried within the Seignory itſelf. Therefore where the queſtion reſpecting the Seignory ariſes in the proprietary governments, or between two provinces of *America*, or in the Iſle of *Man*, it is cognizable by the King's courts in *England* only. In the caſe of the iſle of *Man* * it was ſo decided in the time of Queen *Elizabeth*, by the chief juſtice and many of the judges. So that *emphatically* the *governor* muſt be tried in *England*, to ſee whether he has exerciſed the authority delegated to him by the *Letters Patent* legally and properly; or whether he has abuſed it in violation of the laws of *England*, and the truſt ſo repoſed in him. * 4 *Inſt.* 284.

It does not follow from hence, that let the cauſe of action ariſe where it may, a man is not entitled to make uſe of every juſtification his caſe will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is inveſted, he muſt lay it before the court by way of plea, and the court will exerciſe their judgment whether it is a ſufficient juſtification or not. In this caſe, if the juſtification had been proved, the court might have conſidered it as a ſufficient anſwer; and, if the nature of the caſe would have allowed of it, might have adjudged, that the raiſing a mutiny was a good ground for ſuch a ſummary proceeding. I can conceive caſes in time of war in which a governor would be juſtified, though he acted very arbitrarily, in which he could not be juſtified in time of peace. Suppoſe, during a ſiege or upon an invaſion

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invaſion of *Minorca*, the governor ſhould judge it proper to ſend an hundred of the inhabitants out of the iſland from motives of *real* and *genuine expediency*; or ſuppoſe upon a general ſuſpicion he ſhould take people up as ſpies; upon proper circumſtances laid before the court, it would be very fit to ſee whether he had acted as the governor of a garriſon ought, according to the circumſtances of the caſe. But it is objected, ſuppoſing the defendant to have acted as the *Spaniſh* governor was empowered to do before, how is it to be known here that by the laws and conſtitution of *Spain* he was authorized ſo to act. The way of knowing foreign laws is, by admitting them to be *proved* as *facts*, and the court muſt aſſiſt the jury in aſcertaining what the law is. For inſtance, if there is a *French* ſettlement the conſtruction of which depends upon the cuſtom of *Paris*, witneſſes muſt be received to explain what the cuſtom is; as evidence is received of cuſtoms in reſpect of trade. There is a caſe of the kind I have juſt ſtated *. So in the ſupreme reſort before the King in Council, the Privy Council determines all caſes that ariſe in the plantations, in *Gibraltar*, or *Minorca*, in *Jerſey*, or *Guernſey*; and they inform themſelves, by having the law ſtated to them.—As to ſuggeſtions with regard to the difficulty of bringing witneſſes, the court muſt take care that the defendant is not ſurpriſed, and that he has a fair opportunity of bringing his evidence, if it is a caſe proper in other reſpects for the juriſdiction of the court. There may be ſome caſes ariſing abroad, which may not be fit to be tried here; but that cannot be the caſe of a governor, injuring a man contrary to the duty of his office, and in violation of the truſt repoſed in him by the King's commiſſion.

Foreign laws muſt be proved as facts.

* *Feaubert v. Turſt*, Prec. Ch. an. 1707.

If he wants the teſtimony of witneſſes whom he cannot compel to attend, the court may do what this court did in the caſe of a criminal proſecution of a woman who had received a penſion as an officer's widow: and it was charged in the indictment, that ſhe was never married to him. She alleged a marriage in *Scotland*, but that ſhe could not compel her witneſſes to come up, to give evidence. The court obliged the proſecutor to conſent that the witneſſes might be examined before any of the judges of the court of ſeſſion, or any of the barons of the court of exchequer in *Scotland*, and that the depoſitions ſo taken ſhould be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time, for ever, un-

less the profecutor had fo conſented. The witneſſes were ſo examined before the Lord Preſident of the court of ſeſſion. 1774.

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It is a matter of courſe in aid of a trial at law, to apply to a court of equity, for a commiſſion and injunction in the mean time; and where a real ground is laid, the court will take care that juſtice is done to the defendant as well as to the plaintiff. Therefore, in every light in which I ſee the ſubject, I am of opinion that the action holds *emphatically* againſt the *governor*, if it did not hold in the caſe of any other perſon. If ſo, he is accountable in this court or he is accountable no where; for the king in council has no juriſdiction. Complaints made to the King in council tend to remove the governor, or to take from him any commiſſion, which he holds during the pleaſure of the crown. But if he is in *England*, and holds nothing at the pleaſure of the crown, they have no juriſdiction to make reparation, by giving damages, or to puniſh him in any ſhape for the injury committed. Therefore to lay down in an *Engliſh* court of juſtice ſuch a monſtrous propoſition, as that a governor acting by virtue of letters patent under the great ſeal, is accountable only to God, and his own conſcience; that he is abſolutely deſpotic, and can ſpoil, plunder, and affect his Majeſty's ſubjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

In Lord *Bellamont*'s caſe, 2 *Salk.* 625. cited by Mr. *Peckham*, a motion was made for a trial at bar, and granted, becauſe the *Attorney General* was to defend it on the part of the King; which ſhews plainly that ſuch an action exiſted. And in *Way* verſus *Yally*, 6 *Mod.* 195. Juſtice *Powell* ſays, that an action of falſe impriſonment has been brought here againſt a governor of *Jamaica*, for an impriſonment there, and the laws of the country were given in evidence. The governor of *Jamaica* in that caſe never thought that he was not amenable. He defended himſelf, and poſſibly ſhewed, by the laws of the country, an act of the aſſembly which juſtified that impriſonment, and the court received it as they ought to do. For whatever is a juſtification in the place where the thing is done, ought to be a juſtification where the cauſe is tried.—I remember, early in my time, being counſel in an action brought by a carpenter in the train of artillery, againſt governor *Sabine*, who was governor of *Gibraltar*, and who had barely confirmed the ſentence of a court-martial, by which the plaintiff had been tried, and ſentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it being

1774. being proved at the trial, that the trailers who followed the train, were not liable to martial law; the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence, and gave small damages.

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'The next objection which has been made, is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in England.

Where an action must be laid in the proper county.

'There is a *formal* and a *substantial* distinction as to the *locality* of trials. I state them as different things: the *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the *sheriff* of the *county*; and as trials in *England* are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise *out* of the realm, there is a *substantial* distinction of locality too; for there are some rules that arise out of the realm, which ought not to be tried any where but in the country where they arise; as in the case stated to me by Serjeant *Walker*: if two persons fight in *France*, and battle happening entirely to be there, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here: because, though it is not a criminal prosecution, it must be laid to be against the peace of the King; but the breach of the peace is merely local, though the trespass against the person is transitory. I therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. But if an action were brought relative to an affair in a foreign country, where the question was a matter of title only, and not of damages, there might be a local distinction of locality.

But there is likewise a *formal* distinction, which arises from the mode of trial: for trials in *England* are by jury, and the kingdom being divided into counties, and each county containing all or a large part of districts or principalities, it is absolutely necessary that there should be some county where the action is brought to be prosecuted, that there may be a process in the sheriff of that county, to bring a jury from thence to try it. This method of proceeding in all cases that arise abroad, but the law makes a [illegible] Of this

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matter which is the cauſe of a tranſitory action ariſes within the realm, it may be laid in any county, the place is not material; and if an impriſonment in *Middleſex* it may be laid in *Surrey*, and though proved to be done in *Middleſex*, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of tranſitory actions is never material, except where by particular acts of parliament it is made ſo; as in the caſe of churchwardens and conſtables, and other caſes which require the action to be brought in the county. The parties, upon ſufficient ground, have an opportunity of applying to the court in time to change the *venue*; but if they go to trial without it, that is no objection. So all actions of a tranſitory nature that ariſe abroad may be laid as happening in an *Engliſh* county. But there are occaſions which make it abſolutely neceſſary to ſtate in the declaration, that the cauſe of action really happened abroad; as in the caſe of ſpecialties, where the date muſt be ſet forth. If the declaration ſtates a ſpecialty to have been made at *Weſtminſter* in *Middleſex*, and upon producing the deed, it bears date at *Bengal*, the action is gone; becauſe it is ſuch a *variance* between the deed and the declaration as makes it appear to be a *different* inſtrument. There is ſome confuſion in the books upon the *ſtat.* 6 *Ric.* 2. But I do not put the objection upon that ſtatute. I reſt it ſingly upon this ground. If the true date or deſcription of the bond is not ſtated, it is a variance. But the law has in that caſe invented a fiction; and has ſaid, the party ſhall firſt ſet out the deſcription truly, and then give a *venue* only for form, and for the ſake of trial, by a *videlicet*, in the county of *Middleſex*, or any other county. But no judge ever thought that when the declaration ſaid in *Fort St. George*, *viz.* in *Cheapſide*, that the plaintiff meant it was in *Cheapſide*. It is a *fiction* of *form*; every country has its forms, which are invented for the furtherance of juſtice; and it is a certain rule, that a fiction of law ſhall never be contradicted ſo as to defeat the end for which it was invented, but for every other purpoſe it may be contradicted. Now the fiction invented in theſe caſes is barely for the mode of trial; to every other purpoſe, therefore, it ſhall be contradicted, but not for the purpoſe of ſaying the cauſe ſhall not be tried. So in the caſe that was long agitated and finally determined ſome years ago, upon a fiction of the *teſte* of writs taken out in the vacation, which bear date as of the laſt day of the term, it was held, that the fiction ſhall not be contradicted ſo as to invalidate the writ, by averring that it iſſued on a day in the vacation*: becauſe the fiction was invented for the furtherance

Fictions of law ſhall never be contradicted ſo as to defeat the end for which they were invented; but for every other purpoſe they may be contradicted.

*2 *Burr.* 967.

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furtherance of juſtice; and to make the writ appear right in form. But where the *true* time of ſuing out a *latitat* is *material*, as on a plea of *non aſſumpſit infra ſex annos*, there it may be *ſhewn* that the *latitat* was ſued out *after* the ſix years notwithſtanding the *teſte*. I am ſorry to obſerve, that ſome ſayings have been alluded to, inaccurately taken down, and improperly printed, where the court has been made to ſay, that as men they have one way of thinking, and as judges they have another, which is an abſurdity; whereas in fact they only meant to ſupport the fiction. I will mention a caſe or two to ſhew that that is the meaning of it.

In 6 *Mod.* 228. the caſe of *Roberts* v. *Harnage* is thus ſtated: the plaintiff declared that the defendant became bound to him at *Fort St. David*'s in the *Eaſt Indies* at *London*, in ſuch a bond; upon demurrer the objection was, that the bond appeared to have been ſealed and delivered at *Fort St. David*'s in the *Eaſt Indies*, and, therefore, the date made it local, and, by conſequence, the declaration ought to have been of a bond made at *Fort St. David*'s, in the *Eaſt Indies*, *viz.* at *Iſlington*, in the county of *Middleſex*; or in ſuch a ward or pariſh in *London*, and of that opinion was the whole court. This is an inaccurate ſtate of the caſe. But in 2 Lord *Raym.* 1,042. it is more truly reported, and ſtated as follows: it appeared by the declaration, that the bond was made at *London* in the ward of *Cheap*; upon oyer, the bond was ſet out, and it appeared upon the face of it to be dated at *Fort St. George* in the *Eaſt Indies*; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the court ſaid that it would have been good, if laid at *Fort St. George*, in the *Eaſt Indies*, to wit, at *London*, in the ward of *Cheap*. The objection there was, that they had laid it falſely; for they had laid the bond as made at *London*; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A caſe was quoted from *Latch*, and a caſe from *Lutwyche*, on the former argument, but I will mention a caſe poſterior in point of time, where both thoſe caſes were cited, and no regard at all paid to them; and that is the caſe of *Parker* and *Crook*, 10 *Mod.* 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is ſaid in the declaration to continue at *Fort St. George*, in the *Eaſt Indies*; and upon the oyer of the deed it bore date at *Fort St. George*, and, therefore, the court, as was pretended, had no juriſdiction: *Latch*, *fol.* 4. *Lutwyche*, 950. Lord Chief Juſtice *Parker* ſaid, that an action will lie in *England* upon a deed

a deed dated in foreign parts; or elſe the party can have no remedy; but then in the declaration a place in *England* muſt be alleged *pro formâ*. Generally ſpeaking, the deed, upon the oyer of it, muſt be conſiſtent with the declaration; but in theſe caſes, *propter neceſſitatem*, if the inconſiſtency be as little as poſſible, it is not to be regarded; and here the contract being of a voyage which was to be performed from *Fort St. George* to *Great Britain*, does import, that *Fort St. George* is different from *Great Britain*; and after taking time to conſider of it in *Hilary* term, the plaintiff had his judgment, notwithſtanding the objection. Therefore the whole amounts to this; that where the action is ſubſtantially ſuch a one as the court can hold plea of, as the mode of trial is by jury, and as the jury muſt be called together by proceſs directed to the ſheriff of the county; matter of form is added to the fiction, to ſay it is in that county, and then the whole of the inquiry is, Whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the perſons, but for injuries done by ſubject to ſubject; eſpecially for injuries where the whole that is prayed is a reparation in damages, or ſatisfaction to be made by proceſs againſt the perſon or his effects, within the juriſdiction of the court? We know it is within every day's experience. I was embarraſſed a great while to find out whether the counſel for the plaintiff really meant to make a queſtion of it. In ſea batteries the plaintiff often lays the injury to have been done in *Middleſex*, and then proves it to be done a thouſand leagues diſtant on the other ſide of the *Atlantic*. There are caſes of offences on the high ſeas, where it is of neceſſity to lay in the declaration, that it was done upon the high ſeas; as the taking a ſhip. There is a caſe of that ſort occurs to my memory; the reaſon I remember it is, becauſe there was a queſtion about the juriſdiction. There likewiſe was an action of that kind before Lord Chief Juſtice *Lee*, and another before *me*, in which I quoted that determination, to ſhew, that when the Lords Commiſſioners of prizes have given judgment, that is concluſive in the action; and likewiſe when they have given judgment, it is concluſive as to the coſts, whether they have given coſts or not. It is neceſſary in ſuch actions to ſtate in the declaration, that the ſhip was taken, or ſeized *on the high ſeas*, *videlicet*, in *Cheapſide*. But it cannot be ſeriouſly contended that the judge and jury who try the cauſe, fancy the ſhip is ſailing in *Cheapſide*: no, the plain ſenſe of it is, that as an action

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lies in *England* for the ſhip which was taken on the high ſeas. *Cheapſide* is named as a *venue*; which is ſaying no more, than that the party prays the action may be tried in *London*. But if a party were at liberty to offer reaſons of fact contrary to the truth of the caſe, there would be no end of the embarraſſment. At the laſt ſittings there were two actions brought by *Armenian* merchants, for aſſaults and treſpaſſes in the *Eaſt Indies*, and they are very ſtrong authorities. Serjeant *Glynn* ſaid, that the defendant Mr. *Verelſt* was very ably aſſiſted: ſo he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this caſe had been argued once; yet the counſel did not think it could be ſupported. Mr. *Verelſt* would have been glad to make the objection; he would not have left it to a jury, if he could have ſtopped them ſhort, and ſaid, you ſhall not try the actions at all. I have had ſome actions before me, rather going further than theſe tranſitory actions; that is, going to caſes which in *England* would be local actions: I remember one, I think it was an action brought againſt Captain *Gambier*, who by order of Admiral *Boſcawen* had pulled down the houſes of ſome ſutlers who ſupplied the navy and ſailors with ſpirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the ſailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the ſutler over in his own ſhip, who would never have got to *England* otherwiſe; and as ſoon as he came here he was adviſed that he ſhould bring an action againſt the captain. He brought his action, and one of the counts in the declaration was for pulling down the houſes. The objection was taken to the count for pulling down the houſes; and the caſe of *Skinner* and the *Eaſt-India* company was cited in ſupport of the objection. On the other ſide, they produced from a manuſcript note a caſe before Lord Chief Juſtice *Eyre*, where he over-ruled the objection; and I over-ruled the objection upon this principle, namely, that the reparation here was perſonal, and for damages, and that otherwiſe there would be a failure of juſtice; for it was upon the coaſt of *Nova-Scotia*, where there were no regular courts of judicature: but if there had been, Captain *Gambier* might never go there again; and, therefore, the reaſon of locality in ſuch an action in *England* did not hold. I quoted a caſe of an injury of that ſort in the *Eaſt Indies*, where even in a court of equity Lord *Hardwicke* had directed ſatisfaction to be made in damages; that caſe before

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Lord *Hardwicke* was not much conteſted, but this caſe before me was fully and ſeriouſly argued, and a thouſand pounds damages given againſt captain *Gambier*. I do not quote this for the authority of my opinion, becauſe that opinion is very likely to be erroneous, but I quote it for this reaſon; a thouſand pounds damages and the coſts were a conſiderable ſum. As the captain had acted by the orders of Admiral *Boſcawen*, the repreſentatives of the admiral defended the cauſe, and paid the damages and coſts recovered. The caſe was favourable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

I recollect another cauſe that came on before me; which was the caſe of Admiral *Palliſer*. There the very giſt of the action was local: It was for deſtroying fiſhing huts upon the *Labrador* coaſt. After the treaty of *Paris*, the *Canadians* early in the ſeaſon erected huts for fiſhing; and by that means got an advantage, by beginning earlier, of the fiſhermen who came from *England*. It was a nice queſtion upon the right of the *Canadians*. However the admiral from general principles of policy ordered theſe huts to be deſtroyed. The cauſe went on a great way. The defendant would have ſtopped it ſhort at once, if he could have made ſuch an objection, but it was not made. There are no local courts among the *Eſquimaux Indians* upon that part of the *Labrador* coaſt; and therefore whatever any injury had been done there by any of the King's officers would have been altogether without redreſs, if the objection of locality would have held. The conſequence of that circumſtance ſhews, that where the reaſon fails, even in actions which in *England* would be local actions, yet it does not hold to places beyond the ſeas within the King's dominions. Admiral *Palliſer*'s caſe went off upon a propoſal of a reference, and ended by an award. But as to tranſitory actions, there is not a colour of doubt but that every action that is tranſitory may be laid in any county in *England*, though the matter ariſes beyond the ſeas; and when it is abſolutely neceſſary to lay the truth of the caſe in the declaration, there is a fiction of law to aſſiſt you, and you ſhall not make uſe of the truth of the caſe againſt that fiction, but you may make uſe of it to every other purpoſe. I am clearly of opinion not only againſt the objections made, but that there does not appear a queſtion upon which the objections could ariſe.

The three other judges concurred.

Per Cur. Judgment affirmed.

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SMITH *verſus* POWDICH.

Friday, Nov. 18th.

A poſt-maſter is bound to deliver all letters to the ſeveral inhabitants *within a poſt town or place* at their reſpective *places of abode*, at the rate of poſtage *only* as eſtabliſhed by act of parliament.

THIS was an action for money had and received; Plea *non aſſumpſit*, and iſſue thereupon. At the trial the jury found a ſpecial verdict; the material facts of which were as follow: That the plaintiff *Smith* was an inhabitant of the town of *Hungerford*, and his place of reſidence well known to the defendant *Powdich*. That *Powdich* was deputy poſt-maſter for the town of *Hungerford* under the appointment of the poſt-maſter general: that before and from the making the *ſtat.* 9th *Anne*, for regulating the poſtage of letters, the deputy poſt-maſter had been uſed to receive *one penny* over and *above* the uſual *rate* of *poſtage* from every inhabitant of the ſaid town, for every letter directed and *delivered* to the ſaid inhabitants *at* their reſpective *places* of *abode*, or a recompence by the year, or proportionably for a leſs time in lieu thereof; except when any inhabitant has refuſed to pay the recompence for his delivery at the place of abode, in which caſe the poſt-maſter for the time being hath kept at the ſaid poſt-office, ready to be delivered when called for, the letters of every ſuch inhabitant ſo refuſing as aforeſaid; and except in the inſtance of *one* family in the ſaid town, who refuſed to pay the additional penny above the rate of poſtage fixed by act of parliament, and to whom letters were for five years afterwards delivered at their place of abode for the legal rate of poſtage only; which family at the end of ſuch five years, the poſt-maſter being changed, paid the additional penny. That on 3d *Jan.* 1774, the plaintiff gave notice to the defendant that he would not pay more than the rate of poſtage fixed by act of parliament for any letter brought to the ſaid office for him, and if the defendant did not deliver ſuch letter at the place of abode of the ſaid plaintiff, or received any ſum above ſuch rate of poſtage, he would commence an action againſt him. That on the 5th *Jan.* 1774 the defendant *Powdich* carried a letter directed to the plaintiff at his place of abode in *Hungerford*, but *refuſed* to *deliver* it unleſs the plaintiff would pay an additional penny over and above the poſtage, but was willing to deliver it at the poſt-office for the poſtage only; that after tender by the plaintiff of the poſtage only, and a refuſal by the defendant, he ſubmitted to pay the additional penny. The jury further found that this *demand* if *legal* was a *reaſonable* demand; but whether it was ſo or not they prayed the opinion of the court.

Mr.

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SMITH *verſus* POWELSON.

Mr. *Buller* for the plaintiff. The queſtion ſubmitted upon this record for the opinion of the court is, Whether the deputy poſt-maſter of *Hungerford* is bound to deliver letters to the ſeveral inhabitants of *Hungerford*, to whom they are directed, at their reſpective places of abode, at the ſeveral rates of poſtage eſtabliſhed by act of parliament; or whether he may at his option demand and take any thing more?

This queſtion depends upon the conſtruction of the ſeveral acts of parliament relative to the poſtage of letters, and not on any uſage of a particular place, for no uſage can operate contrary to the expreſs proviſions of an act of parliament. The ſeveral ſtatutes 9 *Ann. c.* 10. 4th *Geo.* 2. *c.* 33. 5 *Geo.* 3. *c.* 25. expreſsly provide for the *delivery* as well as the *conveyance* of letters; and it was neceſſary they ſhould do ſo, on account of the great inconvenience and almoſt impracticability of every perſon fetching their own letters. In *ſtat.* 9 *Ann. c.* 10. *ſect.* 39. it is provided that after the 1ſt of *June* 1743 the old rates ſhould be revived and paid, for the carriage, conveyance, and *delivery* of all letters, *&c.* By the 4 *Geo.* 2. *c.* 33. made for the purpoſe of obviating a doubt concerning the allowance made, upon the delivery of letters ſent by the penny-poſt office beyond the limits then allowed by act of parliament; it is enacted that ſuch allowance of a penny may be legally taken upon the delivery of every letter, originally ſent by the penny-poſt, and not firſt paſſing by the general poſt, and from thence tranſmitted to the penny-poſt; over and above the penny upon putting ſuch letter into the penny-poſt. The exception in this act, of letters ſent by the general poſt, ſhews clearly, that no allowance whatever is to be added to the rate of poſtage on account of delivery.

The *ſtat.* 9 *Ann. c.* 10. *ſ.* 16. provides an additional allowance of a penny for letters delivered from on ſhip-board to the poſt-office: that clauſe therefore is negatively a declaration that it ſhall not be taken in any other caſe.

Again, the *ſtat.* 5 *G.* 3. *c.* 25. *ſect.* 4. ſpeaks of the *limits* of *delivery*; and directs that a *penny extra* ſhall be paid for all ſhip letters directed to places within the limits of the delivery of letters by the deputy poſt-maſter. There can be no doubt therefore under theſe acts but that the poſt-maſter is bound to deliver the letters; but the queſtion made by the defendant is, Whether he is bound to deliver them to the ſeveral inhabitants *within the poſt-town* at their reſpective *houſes*, or only at the poſt-office appointed for the reception of the mail? It is clear it muſt

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mean a *delivery* at the reſpective *houſes* within the town, becauſe the inconvenience would be ſo great as to render it next to impoſſible that every body ſhould fetch their own letters.

Next as to authorities; The caſe of *Barnes* v. *Foley*, *Hil.* 8 *Geo.* 3. 1768. *R. B.* has decided that the poſt-maſter cannot demand or receive any thing for the delivery of letters within the poſt-town, beyond the legal rate of poſtage. In *Stock* v. *Harris*, *Eaſt.* 11 *G.* 3. *R. B.* it was adjudged that the poſt-maſter was entitled to nothing more for the delivery of a letter than the uſual rate of poſtage.

* Since reported in 2 *Blackſt.* Rep. 906.

But in *Rowning* v. *Goodchild*, *Trin.* 13 *Geo.* 3. *C. B.** the general queſtion came before the court, and is deciſive in favour of the plaintiff in this caſe. It was an action againſt the deputy poſt-maſter of *Ipſwich* for not delivering the plaintiff's letters at his place of abode at *Ipſwich*, but on the contrary detaining them, *&c.* Upon not guilty pleaded, the jury found a verdict for the plaintiff, ſubject to the opinion of the court on a caſe ſtated. The queſtion was, Whether the defendant was obliged to deliver the letters to the inhabitants of *Ipſwich* at their places of abode. Lord Chief Juſtice *de Grey* delivered the opinion of the court.

This queſtion depends upon the conſtruction of the *ſtat.* 9 *Ann. c.* 10. and the only conſideration is, What is meant by the word *delivery?* That is, Whether the poſt-maſter is obliged to deliver the letters to the inhabitants at their reſpective places of abode; or, Whether it is ſufficient if the letters are delivered to them at the poſt-office. By *ſect.* 2. it appears that the duty of the poſt-maſter, conſiſts in three articles, namely, receiving, carrying, and delivering letters; by the ſame *ſect.* he is empowered to fix as many ſtages as he thinks fit for that purpoſe. Therefore as the term carrying implies a place and perſon to whom they are to be carried, the term delivering implies a place and perſon to whom they are to be delivered. But the mere quitting of the cuſtody of a letter does not anſwer the idea of the word delivery, nor indeed can the poſt-maſter general, by ſending a letter from his office in *London* to his office at *Ipſwich*, be ſaid to quit the poſſeſſion, it is only a continuation of the cuſtody of it. His Lordſhip compared this 2d *ſect.* with *ſect.* 40. which provides againſt the detaining any letter: with *ſect.* 39. where the delivery as well as the conveyance is named in fixing the poſtage: with *ſect.* 30. which gives a ſummary juriſdiction in caſe of any perſon to whom a letter is delivered refuſing to pay the poſtage: and he likewiſe

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likewiſe cited the *ſtat.* 5 *G.* 3. *c.* 25. *ſtat.* 4 *G.* 2. *c.* 33. and concluded that from a compariſon of all the acts on the ſubject which were uniform and conſiſtent with each other, it was clear the legiſlature meant by delivery, a delivery to the perſon at his place of abode. That the uſage in *London*, and other great commercial towns, as *York* and *Briſtol*, was agreeable to this conſtruction, and that the ſame rule muſt take place throughout the kingdom. The caſe therefore of *Rowning* v. *Goodchild* is deciſive of the queſtion. But there are two particular facts found by this ſpecial verdict which are material. 1ſt. That the poſt-maſter acquieſced in delivering letters to one family, at the legal rate of poſtage, for five years. 2dly, That the poſt-maſter demanded this additional penny, which in the caſe of *Barnes* v. *Foley* it was ſettled he had no right to do; for he cannot impoſe a general tax.

Mr. *Manſfield* for the defendant. With reſpect to the laſt objection, if it were to prevail, it would evade the greater queſtion intended to be decided by this ſpecial verdict, which is framed ſo as to take the ſenſe of the court upon the general queſtion: and as to the acquieſcence of the poſt-maſter in the particular caſe mentioned, it is found that every other perſon except that particular family has been content to pay the additional penny from the firſt eſtabliſhment of the poſt at *Hungerford* to the preſent time. It is further found that this extraordinary payment is a reaſonable ſum for the labour of the poſt-maſter in delivering letters at the houſes of the reſpective inhabitants, unleſs he is bound to deliver them at the legal rate of poſtage only.

The legality of this payment turns upon theſe two grounds. 1ſt. That ſomething is underſtood under the word "*delivery*;" and 2dly, That there is no prohibition againſt taking a conſideration for the delivery of letters in poſt towns.

Firſt, as to the limits of delivery, it is plain from the words of the *ſtat.* 5 *G.* 3. *c.* 25. *ſect.* 4. that limits of delivery mean the whole of a particular diſtrict adjacent to a poſt-town, at which poſt-town letters for the inhabitants of ſuch diſtrict are directed to be left. If that be the true conſtruction, even the *Orkneys* are within the limits of delivery. Every place in *England* is within the limits of ſome delivery or other; therefore no argument to ſhew that delivery means a delivery at the place of abode can be drawn from the expreſſion "limits of delivery." But the words may be as well ſatisfied by a delivery at the poſt-office. If not, the whole revenue would not ſuffice for the expence of

delivery

1774. delivery at the reſpective place of abode of every inhabitant within each particular diſtrict.

SMITH verſus POWDICH. *Secondly*, There is no prohibition againſt taking a conſideration above the legal rate of poſtage for the delivery of letters in poſt-towns.

The prohibitory clauſe in the *ſtat.* 9 *Ann. c.* 10. *ſect.* 17. has in view only the general carriage of letters upon poſt-roads, not within poſt-towns, otherwiſe the argument would be as ſtrong to oblige the poſt-maſter to fetch letters to the poſt-office, as to deliver them at each perſon's houſe, for it equally reſtrains perſons from carrying letters to the poſt-office, as from it.

It appears by the journals of the Houſe of Commons, that a clauſe which was inſerted to prohibit the taking more than the legal poſtage in poſt-towns was rejected.

The *ſtat.* 9 *Ann. c.* 10. *ſect.* 5. which fixes the ſeveral rates of poſtage, does not mention the word delivery, but only poſtage and conveyance, therefore it only means carrying from ſtage to ſtage, not from one part of the town to another.

As to *ſect.* 40. againſt opening or detaining any letter except for want of a true direction, or where the party cannot be found, the legiſlature could never mean to oblige the poſt-maſter to inquire at every houſe in a village or diſtrict before he returned the letter, but only that he ſhould not wilfully delay or embezzle it.

With reſpect to the penny allowed by the *ſtat.* 5 *G.* 3. *c.* 25. *ſect.* 4. for the delivery of letters coming from on board a ſhip, this proviſion was only to ſupply the loſs of dead letters never inquired after. And therefore does not afford the negative inference contended for.

The uſage throughout the kingdom is greatly in favour of the preſent claim; for out of 357 poſt-towns 281 have conſtantly paid a compenſation for the delivery of letters, and the complete anſwer to the inconvenience of people attending to fetch their own letters is, that it is chimerical and viſionary, for it never has, and never will happen.

Lord *Mansfield*. What anſwer do you give to the caſe of *Rowning* v. *Goodchild*?

Mr. *Mansfield*. The judgment in that caſe was given upon the particular ſtate and circumſtances of it; and the court thought that the poſt-maſter could not vary the uſage after the year 1741, which had been practiſed before the year 1741: but they did

not

not decide that in all cases the post-master was obliged to deliver out letters at the places of abode in the town. 1774.

SMITH *versus* POWNALL.

Lord MANSFIELD.—That case is an authority precisely upon the general point: but as it came before the court upon a special case, if the parties at the post-office were desirous to have a special verdict to litigate that opinion, it would not preclude them from bringing the question before this court. I am surprised that on a point of this kind, where either way there may be great inconveniences, where the acts of parliament are doubtful, and where the usage of places is contrary, the post-office does not apply to parliament to settle this matter. Therefore, we avoided the general question in the cases of *Bath* * and *Gloucester* *, determined in this court; and in both those cases there was a right ground for our not going into the general question; which was this, that there the post-master demanded the additional charge as a *duty*; and it would be extraordinary, if parliament meant a duty should be raised at every post-town, that they did not fix it themselves, instead of leaving it in the breast of the post-master. Another reason why we wished to leave it open for the interference of parliament, was the unanswerable inconvenience of every body going to the post-office for their letters, on the one side, and on the other, the burthen to the post-master in not being allowed to deliver them to any person for gain.

* *Barnes* v. *Foley.*
* *Stock* v. *Harris.*

But that struck me in the *Gloucester* * cause, which I thought the true construction; namely, that there is a distinction between the place where the post-master ought to have the burthen thrown on him, and one beyond which he ought not to have it. I am convinced that the stress which has been laid in the argument of to-day on the opinion of the *C. B.* respecting the 4th *sect.* 5 *Geo.* 3. and which explains delivery to mean delivery at every body's place of abode within the limits of delivery, means all the district within a post-town; just as if you asked a man where he lived, and what was his post-town.

* *Stock* v. *Harris.*

There is, however, a section in *stat.* 9 *Ann. c.* 10. *sect.* 22. which seems to mark the reasonable line, beyond which the post master is not obliged, but within which he is obliged to deliver letters; the words of the section are as follow; "pro-"vided always and be it further enacted, that nothing herein "contained shall be understood to prohibit the carrying or re-"carrying of any letters or packets, to or from any town or "place, to or from the next respective post-road or stage ap-"pointed for that purpose, above six miles from the said general "post-

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" poſt-office, or the chief offices of *Edinburgh* and *Dublin*; but " that every perſon ſhall have free liberty to ſend and employ " ſuch perſon or perſons as they ſhall think fit, to carry the ſaid " letters or packets, as aforeſaid, without any forfeiture or " penalty therefore; any thing herein contained to the contrary " notwithſtanding."

Now there is no general poſt that goes within 7 or 8 miles of *London*; nevertheleſs the poſt-maſter has always delivered letters within *London* and the contiguous buildings at the eſtabliſhed rate of poſtage: But he never delivered them at *Putney*; that is a ſtrong proof, coeval with the 1ſt ſtatute which eſtabliſhed a rate of poſtage, that there are boundaries. And this ſection lays a foundation for me to ſay, that there is ſuch a line. The legiſlature forbids all letters to be carried by any other perſons under certain circumſtances and reſtrictions; but it appeared neceſſary, if a place was four or five miles diſtant from a poſt-town or ſtage, that letters ſhould be carried, and the perſons carrying them paid for it. And I lay ſtreſs on the term *any town or place*. It ſays " *Town* or *place*;" becauſe there are ſome ſtages where there is but a ſingle houſe, as *Hartfordbridge*; but the town is conſidered as one ſpot, and the whole of it is taken as *terminus ad quem*. In the *Gloceſter* caſe, *Stock* v. *Harris*, *Hil.* 11 *G.* 3. *R. B.* the court conſidered the city of *Gloceſter* as the poſt-town or place, in oppoſition to limits out of the town; and on that foundation it was held that the poſt-maſter had no right to vary the former uſage. *Vide* this caſe ſince reported 5 *Burr.* 2,709.

In the preſent caſe, the poſt-office contends, that *in* the *town* there is no houſe that ſhall not pay an additional ſum for the delivery; which is in the higheſt degree unreaſonable, if there is a diſtinction, which the poſt-office itſelf ſeems to have made, as in *London*; *viz.* in reſpect to places contiguous to it. The poſt-town or place is certainly a boundary, within which the poſt-maſter is obliged to deliver letters at the rate of poſtage as eſtabliſhed by act of parliament: and here the plaintiff's houſe is *within* the poſt-town. But in this caſe alſo the defendant has *demanded* the additional charge, as a *duty*, which he has no right to do whatever: So that we might get clear of it upon that ground, as we did in the *Bath* caſe. But we do not avoid the general queſtion: on the contrary, our deciſion is expreſsly upon the general queſtion. If the queſtion is made with a view to controvert the judgment in the Common Pleas, we will defer our opinion to a

ſecond

second argument. My distinction does not go to the sending a letter two or three miles out of town. 1774.

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ASTON Justice. In *Stock* v. *Harris*, the *Gloucester* case, the court decided that the post-master was obliged to *deliver* letters to all persons *in the post town* at the legal rate of postage *only*. The case of *Rowning* v. *Goodchild*, in *C. B.* is a decision upon the general question. A single post-house not in a town might possibly afford a question. But this is a post-town, and I am clearly of opinion, that the post master is bound to deliver all letters within the post-town. If it is necessary to lay any additional charge, there ought to be an application to parliament for the purpose. The post-master cannot impose any sum: I am very well satisfied he has no such right: and with respect to inconvenience, it would be of infinite and general inconvenience to the public at large, if they were obliged to fetch their letters from the post-office; whereas this is only a private and particular inconvenience to the post-master.

WILLES Justice. I am most clearly of the same opinion. The usage in *London* and other great towns has been, to deliver all letters at the houses of the respective inhabitants to whom they are directed. In smaller post-towns the post-master has declined to do so without an additional allowance: probably because there were only a few persons to dispute the right. I think a post-town is different from what the case of a single post-house might be.

The *Bath* case was exactly this case. The defendant demanded the additional sum; and it was there clearly held he had no right to make such demand. So here it is *demanded*. The case of *Gloucester* was decided upon the usage; those two cases, therefore, did not decide the general question: but the case of *Rowning* v. *Goodchild* *, *C. B.* did. And, therefore, I am of opinion upon both grounds, namely, upon the general ground, and likewise upon its being a demand, that judgment should be given for the plaintiff.

* 2 *Black.* Rep. 906.

ASHHURST Justice. I am of the same opinion.

Postea delivered to the plaintiff.

DOE on the demise of Bayntun *versus* WATTON, and another. *Same day.*

IN ejectment, upon not guilty pleaded, the jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case.

That *Jane Bayntun*, being seised in fee of the premises in the declaration mentioned, by her will bearing date *Sept.* 30, 1745.

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DOE dem. WATTON.

1745, duly executed, gave and deviſed the ſame to her nephew *Stucley Bayntun* for life, with remainder to his firſt and other ſons in tail mail, and the iſſue male of the body of ſuch ſons, and in default of ſuch iſſue to her nephew *Henry Bayntun* in like manner, with remainder to her nephew *William Bayntun* the leſſor of the plaintiff in like manner. In which will was contained the following power: "I do hereby declare, elect, and "appoint, and my will and mind is that it ſhall and may be "lawful to and for the ſaid *Stucley Bayntun*, *Henry Bayntun* and "*William Bayntun*, and for each and every of them, at any "time or times, when they ſhall come into the actual poſſeſſion "of the ſaid manors, capital meſſuages, and premiſes hereby "by me given to them as aforeſaid, by any writing or writings "to be ſubſcribed and ſealed by any or either of them, when "poſſeſſed of the ſaid premiſes as aforeſaid, in the preſence of "three witneſſes, at the leaſt, to demiſe, leaſe, or grant the "ſaid premiſes, to each of them hereby granted as aforeſaid, to "any perſon or perſons whatſoever, for the term of one and "twenty years, or under, or for any number or term of years "determinable upon one, two, or three lives, *in poſſeſſion*, and "*not in reverſion*."

That the ſaid *Jane Bayntun* died ſeiſed of the ſaid premiſes; on whoſe death the ſaid *Stucley Bayntun* entered, and in his life time the ſaid *Henry Bayntun* died without iſſue.

That the ſaid *Stucley Bayntun*, on *Jan.* 21ſt 1772, by indenture made and duly executed between the ſaid *Stucley Bayntun* of the one part, and *Anne Surman* of *Chadlington* of the other part, did demiſe all and ſingular the ſaid premiſes in the ſaid ejectment mentioned, to the ſaid *Anne Surman*, to hold unto the ſaid *Anne Surman*, her executors, adminiſtrators, and aſſigns, *from the day of the date* thereof, for and during and unto the full end and term of fourſcore and nineteen years, from thence next enſuing, and fully to be complete and ended, if ſhe the ſaid *Anne Surman*, *Sarah Newman*, and *Edward Newman*, ſon and daughter of *Hannah Newman* of *Chadlington* aforeſaid, any or either of them, ſhould ſo long happen to live, &c.

That the ſaid *Stucley Bayntun* died without iſſue.

The queſtion was, Whether upon the whole of this caſe the plaintiff had a right and title to recover?

Mr. *Howorth* for the plaintiff objected, that this leaſe being made to commence *from the day of the date*, was a leaſe in *reverſion* and not in *poſſeſſion*; and therefore not purſuant to the power.

Mr.

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Mr. *Baldwin* for the defendant acknowledged there were a great many authorities againſt him, in caſes of *freehold* demiſes; but none in the caſe of a leaſe under a *power* given. On the contrary, he inſiſted, that the execution of powers have always been conſtrued moſt liberally in favour of the party for whoſe benefit they are intended: and cited *Tollett* verſus *Tollet*, 2 *P. Wms.* 489. where *Baron* having a power to make a jointure by *deed*, did it by *will*, and the court held it a good execution of the power notwithſtanding.

With reſpect to the leaſe being a leaſe in reverſion, as being to commence *from the day of the date*, he cited the caſe of *Llwellen* verſus *Morgan*, cited in 3 *Bulſtrode*, 203. *Bacon* verſus *Waller*; in which firſt caſe it was held, that a leaſe made *habendum a datu* and *a die datûs*, was all one.

In 2 *Salk.* 413. 1 Lord *Raym.* 84. *S. C.* it is laid down that a leaſe to commence *a datu*, *includes* the day of the date.

And in 2 *Wilſon* 165. *Freeman* on demiſe of *Vernon* verſus *Weſt*, the court decided, that a leaſe for lives to begin from the day of the date, and ſeiſin delivered afterwards, is good, and ſhall not be ſaid to convey a freehold to commence *in futuro*: and in a note at the end of the report, it is added, that Mr. Juſtice *Wilmot*, at a former trial in ejectment upon this ſame leaſe, was of opinion, that from the date and from the day of the date, was the very ſame, and both included the day.

ASHHURST Juſtice. Mr. Juſtice *Wilmot* in that caſe left it to the jury to ſay, whether they would not preſume that livery of *ſeiſin* was made ſubſequent to the leaſe.

Mr. *Howorth*. The diſtinction that univerſally prevails through all the caſes is, that a leaſe to commence from the date includes the day, but a leaſe to commence from the day of the date, as in the preſent caſe, excludes the day of the leaſe made: and the caſe of the Counteſs of *Portland*, in the *Exchequer*, is in point. It was argued four times and finally adjudged. The caſe cited from *Wilſon* muſt be a miſtake.

Lord MANSFIELD. I think it muſt be ſo, and the other authorities are, I am afraid, too ſtrong to get over. At the ſame time I am ſorry that there ever exiſted a determination, which avoided a fair leaſe, by conſtruing from the day of the date, to exclude the day of the date; becauſe it may be taken either way. It would have been a very right principle of law to have ſaid, if the one conſtruction will render the leaſe good, and the other

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will make it void, the conſtruction which makes the leaſe good ſhall prevail; becauſe it muſt manifeſtly have been the intention of all parties, that the leaſe ſhould be a valid and effectual leaſe. I applaud Lord Chief Juſtice *Wilmot*, for leaving it to the jury, to preſume livery of *ſeiſin* the laſt moment of the day, and if this caſe could be determined that way, I certainly ſhould wiſh for it; but it cannot. If you think you can find a contrariety of authorities, I ſhould be glad to lay hold of it, and ſhould be glad to bring the matter back to common ſenſe and the cleareſt principles of juſtice: adding the word *excluſive*, or *incluſive*, would be deciſive. Then it is a queſtion of conſtruction which word ſhould be implied.

ASTON Juſtice. I think it a very hard caſe; but the authorities are too many to be got over. The caſe in *Wilſon* muſt be a miſtake.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred.

Judgment for the Leſſor of the Plaintiff.

Vide poſt. *Doe ex dim. Pugh* verſus Duke of *Leeds*, *infra*, 724. a very elaborate opinion of the court, in which it was held, that *from the date* and *from the day of the date* may both *include* the day of the date.

Same day.

SCHULDAM *verſus* BUNNISS and another.

Perſons empowered by ſtat. 3 Geo. 3. c. 15. to inſpect the entries of freemen, have a right to inſpect ALL *books*, papers, &c. in which the admiſſions of freemen are entered. And where there are *two* or more *Bailiffs*, &c. of a Borough or Corporation, a *joint* action will lie, if they refuſe inſpection, though the words of the ſtatute are in the ſingular number, *mayor*, *bailiff*, &c.

IN debt for five penalties upon the *Stat.* 3 *G.* 3. *c.* 15. the declaration conſiſted of five counts.

At the trial a verdict was given for the defendants, upon the ſecond count, and for the plaintiff upon all the other counts, ſubject to the opinion of the court, on the following caſe.

"That the borough of *Aldeburgh* ſends members to parliament; that the freemen of the borough become ſuch, either "from a ſervitude of ſeven years apprenticeſhip, or by election; "that the right of electing freemen is in the capital burgeſſes "by act of court, in their corporate aſſemblies, conſiſting of a "certain number of the members of the borough of certain "denominations."

"That there is an *aſſembly book*, in which the election of "officers, the nomination and *admiſſion* of freemen, and all other "acts of court are entered; which book is kept in a cheſt, under "two locks and keys, and is in the cuſtody of the bailiffs of the "borough. That the entries of admiſſions of freemen in this

book expreſs them as being *duly elected*, or as taking by *ſervitude:* but almoſt all the freemen are now *honorary* freemen. That for about eight years laſt paſt, the admiſſions of freemen have not been entered in this book; and the town clerk ſaid, they were ſo omitted by direction; but that ſuch direction was not the order of the court. 1774. SCHUL-DAM *verſus* BUNNISS.

That there is likewiſe a *ſtampt book*, made and kept by the town clerk, in which the admiſſions of freemen are entered, with the times of their admiſſion; but it does not contain the names and characters of the perſons conſtituting the courts at which the admiſſions were made. That in this book the title to the freedom is not in general ſet out, but there are a few inſtances in which the freemen are ſaid to have been *elected*, and in one or two to have taken up their freedom by *ſervitude*.

That there is likewiſe a copy or duplicate of this book which is kept by the bailiffs.

The town clerk alſo ſaid, that ſince the entry of the admiſſions in the *aſſembly book* had been diſcontinued, he had ſometimes taken a minute of the admiſſions on looſe papers; but that he did not file them or preſerve them in any order, but ſometimes carried them home to his houſe at *Ipſwich*, and ſometimes left them looſe in the *aſſembly book*.

The town clerk likewiſe ſaid, that a diſhoneſt man in his office had it in his power, if he was ſo diſpoſed, to enter fictitious freemen in the *ſtampt book*.

That in *May* 1773, there was an election for one member of parliament; when Mr. *Fonnereau* and the aforeſaid Mr. *Long* were candidates; and there having been a large creation of freemen lately made, by the intereſt of Mr. *Fonnereau*, Mr. *Long* was deſirous of ſeeing whether they were made conſtitutionally; and therefore cauſed the ſeveral demands ſtated in the declaration for the inſpection of the *aſſembly book*, to be duly made, according to the direction of the ſtat. 3 *Geo.* 3. But the defendants refuſed to produce it, or to permit ſuch inſpection; referring the parties demanding the ſame, to the *ſtampt book*, in the hands of the town clerk (of which Mr. *Long* had had a copy before, and in which the late creation was inſerted), or offered to produce the duplicate in their cuſtody, for inſpection.

One of the preſent bailiffs at the trial, though ſubpœnaed for that purpoſe with a *ſubpœna duces tecum*, refuſed to produce the ſaid book at the trial.

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mean a *delivery* at the reſpective *houſes* within the town, becauſe the inconvenience would be ſo great as to render it next to impoſſible that every body ſhould fetch their own letters.

Next as to authorities; The caſe of *Barnes* v. *Foley*, *Hil.* 8 *Geo.* 3. 1768. *R. B.* has decided that the poſt-maſter cannot demand or receive any thing for the delivery of letters within the poſt-town, beyond the legal rate of poſtage. In *Stock* v. *Harris*, *Eaſt.* 11 *G.* 3. *R. B.* it was adjudged that the poſt-maſter was entitled to nothing more for the delivery of a letter than the uſual rate of poſtage.

But in *Rowning* v. *Goodchild*, *Trin.* 13 *Geo.* 3. *C. B.** the general queſtion came before the court, and is deciſive in favour of the plaintiff in this caſe. It was an action againſt the deputy poſt-maſter of *Ipſwich* for not delivering the plaintiff's letters at his place of abode at *Ipſwich*, but on the contrary detaining them, *&c.* Upon not guilty pleaded, the jury found a verdict for the plaintiff, ſubject to the opinion of the court on a caſe ſtated. The queſtion was, Whether the defendant was obliged to deliver the letters to the inhabitants of *Ipſwich* at their places of abode. Lord Chief Juſtice *de Grey* delivered the opinion of the court.

* Since reported in 2 *Black.* Rep. 906.

This queſtion depends upon the conſtruction of the *ſtat.* 9 *Ann. c.* 10. and the only conſideration is, What is meant by the word *delivery?* That is, Whether the poſt-maſter is obliged to deliver the letters to the inhabitants at their reſpective places of abode; or, Whether it is ſufficient if the letters are delivered to them at the poſt-office. By *ſect.* 2. it appears that the duty of the poſt-maſter, conſiſts in three articles, namely, receiving, carrying, and delivering letters; by the ſame *ſect.* he is empowered to fix as many ſtages as he thinks fit for that purpoſe. Therefore as the term carrying implies a place and perſon to whom they are to be carried, the term delivering implies a place and perſon to whom they are to be delivered. But the mere quitting of the cuſtody of a letter does not anſwer the idea of the word delivery, nor indeed can the poſt-maſter general, by ſending a letter from his office in *London* to his office at *Ipſwich*, be ſaid to quit the poſſeſſion, it is only a continuation of the cuſtody of it. His Lordſhip compared this 2d *ſect.* with *ſect.* 40. which provides againſt the detaining any letter: with *ſect.* 39. where the delivery as well as the conveyance is named in fixing the poſtage: with *ſect.* 30. which gives a ſummary juriſdiction in caſe of any perſon to whom a letter is delivered refuſing to pay the poſtage: and he likewiſe

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likewiſe cited the *ſtat.* 5 *G.* 3. *c.* 25. *ſtat.* 4 *G.* 2. *c.* 33. and concluded that from a compariſon of all the acts on the ſubject which were uniform and conſiſtent with each other, it was clear the legiſlature meant by delivery, a delivery to the perſon at his place of abode. That the uſage in *London*, and other great commercial towns, as *York* and *Briſtol*, was agreeable to this conſtruction, and that the ſame rule muſt take place throughout the kingdom. The caſe therefore of *Rowning* v. *Goodchild* is deciſive of the queſtion. But there are two particular facts found by this ſpecial verdict which are material. 1ſt. That the poſt-maſter acquieſced in delivering letters to one family, at the legal rate of poſtage, for five years. 2dly, That the poſt-maſter demanded this additional penny, which in the caſe of *Barnes* v. *Foley* it was ſettled he had no right to do; for he cannot impoſe a general tax.

Mr. *Manſfield* for the defendant. With reſpect to the laſt objection, if it were to prevail, it would evade the greater queſtion intended to be decided by this ſpecial verdict, which is framed ſo as to take the ſenſe of the court upon the general queſtion: and as to the acquieſcence of the poſt-maſter in the particular caſe mentioned, it is found that every other perſon except that particular family has been content to pay the additional penny from the firſt eſtabliſhment of the poſt at *Hungerford* to the preſent time. It is further found that this extraordinary payment is a reaſonable ſum for the labour of the poſt-maſter in delivering letters at the houſes of the reſpective inhabitants, unleſs he is bound to deliver them at the legal rate of poſtage only.

The legality of this payment turns upon theſe two grounds. 1ſt. That ſomething is underſtood under the word "*delivery*;" and 2dly, That there is no prohibition againſt taking a conſideration for the delivery of letters in poſt towns.

Firſt, as to the limits of delivery, it is plain from the words of the *ſtat.* 5 *G.* 3. *c.* 25. *ſect.* 4. that limits of delivery mean the whole of a particular diſtrict adjacent to a poſt-town, at which poſt-town letters for the inhabitants of ſuch diſtrict are directed to be left. If that be the true conſtruction, even the *Orkneys* are within the limits of delivery. Every place in *England* is within the limits of ſome delivery or other; therefore no argument to ſhew that delivery means a delivery at the place of abode can be drawn from the expreſſion "limits of delivery." But the words may be as well ſatisfied by a delivery at the poſt-office. If not, the whole revenue would not ſuffice for the expence of delivery

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freemen, none shall vote unless they shall have been admitted to their freedom twelve calendar months previous to the election; with an exception however as to all those, who are made freemen upon the foundation of inchoate rights; as by birth, marriage, or servitude. In this act there is a clause, upon which the present action is brought. I will read it.

"And be it further enacted by the authority aforesaid, that "the mayor,* bailiff, sheriff, town-clerk, or other officer of any "corporation, having the custody of, or power over the records "of the same, &c."

You observe from my manner of reading it that this clause is technically penned; and though throughout the kingdom it is well known these offices are executed by more persons than one, and that there are other offices in which many persons are joined, yet this act considers each officer as single, and describes him according to his office.

The present action was brought against the two defendants, as the bailiff of the town of *Aldborough*, for refusing the plaintiff an inspection of the book or books wherein were entered the admission of freemen; and it is brought against them *jointly* as the *bailiff* or persons executing that office. (His Lordship stated the case *verbatim*, and proceeded thus:)

At the trial there was no other question or difficulty than barely whether the assembly book was within the description of the act of parliament. And there can be no doubt as to that; because the act relates to all books which contain the nomination and admission of freemen, and this is such a book, though it is not a book that comes down to late times. But a party may want to know whether other persons have a right by servitude, &c. as well as to discover who are occasional freemen, therefore he has a right to inspect all such books and papers. In this case the stampt book, at best, is but an irregular one. But it did appear to me on the state of the case, that the bailiffs had conceived a doubt upon that point; and having been taught to believe, from the circumstance of the occasional freemen being entered in the stampt book, and the act of parliament operating only upon such freemen as were admitted within a year, that the stampt book was the only book within the meaning of the act, they had proceeded under an apprehension that they were right in refusing an inspection of any other.

* His Lordship laid a stress upon the name of each different officer being in the singular number.

That

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That being the light in which I ſaw their conduct, I did not doubt at all that for ſeveral offences ſeveral penalties might be recovered; but I thought a verdict for ſo many penalties hard and unreaſonable. No doubt if a party choſe to go to the utmoſt extent and rigour of the act, he might, by repeated demands, raiſe 10,000*l.* or a larger ſum. I therefore was willing to liſten to the objections, and recommended it to the parties to conſider whether they would inſiſt upon all the penalties.

A formal objection which has been made is, Whether the action can be maintained againſt *both*; and moſt undoubtedly it may; for the breach of truſt in one is a breach of truſt in both. But in this caſe the fact is, that they both refuſed: therefore there can be no doubt but that they might be charged *jointly*.

Aſton Juſtice. The right given by the act of parliament, is a right of inſpecting all books in which the admiſſions of freemen are inſerted: and copies may be taken by the parties applying. And a candidate may not only want them for the purpoſe of ſeeing who his adverſaries are; but it may be likewiſe neceſſary to him for the purpoſe of taking copies of the admiſſions of his own voters. Therefore he has clearly a right to ſee *all* the books.

With regard to the other queſtion, Whether the action will lie againſt them jointly; the bailiffs are in law but one officer. If one had opened the books and the other had refuſed, no action could lie againſt the latter. But here both refuſed; and both muſt anſwer for the delinquency of both.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* of the ſame opinion.

Let the *Poſtea* be delivered to the plaintiff.

CLARKE *verſus* SHEE and JOHNSON.

Tueſday, Nov. 22d.

Caſe for *money had and received*, will lie by the *true owner* of money or notes againſt a third perſon, into whoſe hands they have come *malâ fide*; provided their identity can be traced and aſcertained.

THIS was an action of treſpaſs on the caſe, wherein the plaintiff declared, that the defendants on the 1ſt of *June* 1773, at *London*, &c. were indebted to the plaintiff in the ſum of 1,000*l.* for divers ſums of money to the defendants, by the plaintiff, at the ſpecial inſtance and requeſt of the defendants, before that time lent and advanced. There were two other counts for money laid out and expended, and for *money had and received* by the defendants to the plaintiff's uſe.

To this declaration the defendants pleaded the *general iſſue*, and thereupon iſſue was joined.

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" poſt-office, or the chief offices of *Edinburgh* and *Dublin*; but " that every perſon ſhall have free liberty to ſend and employ " ſuch perſon or perſons as they ſhall think fit, to carry the ſaid " letters or packets, as aforeſaid, without any forfeiture or " penalty therefore; any thing herein contained to the contrary " notwithſtanding."

Now there is no general poſt that goes within 7 or 8 miles of *London*; nevertheleſs the poſt-maſter has always delivered letters within *London* and the contiguous buildings at the eſtabliſhed rate of poſtage: But he never delivered them at *Putney*; that is a ſtrong proof, coeval with the 1ſt ſtatute which eſtabliſhed a rate of poſtage, that there are boundaries. And this ſection lays a foundation for me to ſay, that there is ſuch a line. The legiſlature forbids all letters to be carried by any other perſons under certain circumſtances and reſtrictions; but it appeared neceſſary, if a place was four or five miles diſtant from a poſt-town or ſtage, that letters ſhould be carried, and the perſons carrying them paid for it. And I lay ſtreſs on the term *any town or place*. It ſays " *Town* or *place*;" becauſe there are ſome ſtages where there is but a ſingle houſe, as *Hartfordbridge*; but the town is conſidered as one ſpot, and the whole of it is taken as *terminus ad quem*. In the *Gloceſter* caſe, *Stock* v. *Harris*, *Hil.* 11 *G.* 3. *R. B.* the court conſidered the city of *Gloceſter* as the poſt-town or place, in oppoſition to limits out of the town; and on that foundation it was held that the poſt-maſter had no right to vary the former uſage. *Vide* this caſe ſince reported 5 *Burr.* 2,709.

In the preſent caſe, the poſt-office contends, that *in* the *town* there is no houſe that ſhall not pay an additional ſum for the delivery; which is in the higheſt degree unreaſonable, if there is a diſtinction, which the poſt-office itſelf ſeems to have made, as in *London*; *viz.* in reſpect to places contiguous to it. The poſt-town or place is certainly a boundary, within which the poſt-maſter is obliged to deliver letters at the rate of poſtage as eſtabliſhed by act of parliament: and here the plaintiff's houſe is *within* the poſt-town. But in this caſe alſo the defendant has *demanded* the additional charge, as a *duty*, which he has no right to do whatever: So that we might get clear of it upon that ground, as we did in the *Bath* caſe. But we do not avoid the general queſtion: on the contrary, our deciſion is expreſsly upon the general queſtion. If the queſtion is made with a view to controvert the judgment in the Common Pleas, we will defer our opinion to a

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second argument. My diſtinction does not go to the ſending a letter two or three miles out of town.

ASTON Juſtice. In *Stock* v. *Harris*, the *Gloceſter* caſe, the court decided that the poſt-maſter was obliged to *deliver* letters to all perſons *in the poſt town* at the legal rate of poſtage *only*. The caſe of *Rowning* v. *Goodchild*, in *C. B.* is a deciſion upon the general queſtion. A ſingle poſt-houſe not in a town might poſſibly afford a queſtion. But this is a poſt-town, and I am clearly of opinion, that the poſt maſter is bound to deliver all letters within the poſt-town. If it is neceſſary to lay any additional charge, there ought to be an application to parliament for the purpoſe. The poſt-maſter cannot impoſe any ſum: I am very well ſatisfied he has no ſuch right: and with reſpect to inconvenience, it would be of infinite and general inconvenience to the public at large, if they were obliged to fetch their letters from the poſt-office; whereas this is only a private and particular inconvenience to the poſt-maſter.

WILLES Juſtice. I am moſt clearly of the ſame opinion. The uſage in *London* and other great towns has been, to deliver all letters at the houſes of the reſpective inhabitants to whom they are directed. In ſmaller poſt-towns the poſt-maſter has declined to do ſo without an additional allowance: probably becauſe there were only a few perſons to diſpute the right. I think a poſt-town is different from what the caſe of a ſingle poſt-houſe might be.

The *Bath* caſe was exactly this caſe. The defendant demanded the additional ſum; and it was there clearly held he had no right to make ſuch demand. So here it is *demanded*. The caſe of *Gloceſter* was decided upon the uſage; thoſe two caſes, therefore, did not decide the general queſtion: but the caſe of *Rowning* v. *Goodchild* *, *C. B.* did. And, therefore, I am of opinion upon both grounds, namely, upon the general ground, and likewiſe upon its being a demand, that judgment ſhould be given for the plaintiff.

* 2 *Black.* Rep. 906.

ASHHURST Juſtice. I am of the ſame opinion.

Poſtea delivered to the plaintiff.

DOE on the demiſe of Bayntun *verſus* WATTON, and another.

Same day.

IN ejectment, upon not guilty pleaded, the jury found a verdict for the plaintiff, ſubject to the opinion of the court upon the following caſe.

That *Jane Bayntun*, being ſeiſed in fee of the premiſes in the declaration mentioned, by her will bearing date *Sept.* 30, 1745.

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1745, duly executed, gave and deviſed the ſame to her nephew *Stucley Bayntun* for life, with remainder to his firſt and other ſons in tail mail, and the iſſue male of the body of ſuch ſons, and in default of ſuch iſſue to her nephew *Henry Bayntun* in like manner, with remainder to her nephew *William Bayntun* the leſſor of the plaintiff in like manner. In which will was contained the following power: "I do hereby declare, elect, and "appoint, and my will and mind is that it ſhall and may be "lawful to and for the ſaid *Stucley Bayntun*, *Henry Bayntun* and "*William Bayntun*, and for each and every of them, at any "time or times, when they ſhall come into the actual poſſeſſion "of the ſaid manors, capital meſſuages, and premiſes hereby "by me given to them as aforeſaid, by any writing or writings "to be ſubſcribed and ſealed by any or either of them, when "poſſeſſed of the ſaid premiſes as aforeſaid, in the preſence of "three witneſſes, at the leaſt, to demiſe, leaſe, or grant the "ſaid premiſes, to each of them hereby granted as aforeſaid, to "any perſon or perſons whatſoever, for the term of one and "twenty years, or under, or for any number or term of years "determinable upon one, two, or three lives, *in poſſeſſion*, and "*not in reverſion*."

That the ſaid *Jane Bayntun* died ſeiſed of the ſaid premiſes; on whoſe death the ſaid *Stucley Bayntun* entered, and in his life time the ſaid *Henry Bayntun* died without iſſue.

That the ſaid *Stucley Bayntun*, on *Jan.* 21ſt 1772, by indenture made and duly executed between the ſaid *Stucley Bayntun* of the one part, and *Anne Surman* of *Chadlington* of the other part, did demiſe all and ſingular the ſaid premiſes in the ſaid ejectment mentioned, to the ſaid *Anne Surman*, to hold unto the ſaid *Anne Surman*, her executors, adminiſtrators, and aſſigns, *from the day of the date* thereof, for and during and unto the full end and term of fourſcore and nineteen years, from thence next enſuing, and fully to be complete and ended, if ſhe the ſaid *Anne Surman*, *Sarah Newman*, and *Edward Newman*, ſon and daughter of *Hannah Newman* of *Chadlington* aforeſaid, any or either of them, ſhould ſo long happen to live, *&c.*

That the ſaid *Stucley Bayntun* died without iſſue.

The queſtion was, Whether upon the whole of this caſe the plaintiff had a right and title to recover?

Mr. *Howorth* for the plaintiff objected, that this leaſe being made to commence *from the day of the date*, was a leaſe in *reverſion* and not in *poſſeſſion*; and therefore not purſuant to the power.

Mr.

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Mr. *Baldwin* for the defendant acknowledged there were a great many authorities againſt him, in caſes of *freehold* demiſes; but none in the caſe of a leaſe under a *power* given. On the contrary, he inſiſted, that the execution of powers have always been conſtrued moſt liberally in favour of the party for whoſe benefit they are intended: and cited *Tollett* verſus *Tollet*, 2 *P. Wms.* 489. where *Baron* having a power to make a jointure by *deed*, did it by *will*, and the court held it a good execution of the power notwithſtanding.

With reſpect to the leaſe being a leaſe in reverſion, as being to commence *from the day of the date*, he cited the caſe of *Lluellen* verſus *Morgan*, cited in 3 *Bulſtrode*, 203. *Bacon* verſus *Waller*; in which firſt caſe it was held, that a leaſe made *habendum a datu* and *a die datûs*, was all one.

In 2 *Salk.* 413. 1 Lord *Raym.* 84. *S. C.* it is laid down that a leaſe to commence *a datu*, *includes* the day of the date.

And in 2 *Wilſon* 165. *Freeman* on demiſe of *Vernon* verſus *Weſt*, the court decided, that a leaſe for lives to begin from the day of the date, and ſeiſin delivered afterwards, is good, and ſhall not be ſaid to convey a freehold to commence *in futuro*: and in a note at the end of the report, it is added, that Mr. Juſtice *Wilmot*, at a former trial in ejectment upon this ſame leaſe, was of opinion, that from the date and from the day of the date, was the very ſame, and both included the day.

ASHHURST Juſtice. Mr. Juſtice *Wilmot* in that caſe left it to the jury to ſay, whether they would not preſume that livery of *ſeiſin* was made ſubſequent to the leaſe.

Mr. *Howorth*. The diſtinction that univerſally prevails through all the caſes is, that a leaſe to commence from the date includes the day, but a leaſe to commence from the day of the date, as in the preſent caſe, excludes the day of the leaſe made: and the caſe of the Counteſs of *Portland*, in the *Exchequer*, is in point. It was argued four times and finally adjudged. The caſe cited from *Wilſon* muſt be a miſtake.

Lord MANSFIELD. I think it muſt be ſo, and the other authorities are, I am afraid, too ſtrong to get over. At the ſame time I am ſorry that there ever exiſted a determination, which avoided a fair leaſe, by conſtruing from the day of the date, to exclude the day of the date; becauſe it may be taken either way. It would have been a very right principle of law to have ſaid, if the one conſtruction will render the leaſe good, and the other

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will make it void, the conſtruction which makes the leaſe good ſhall prevail; becauſe it muſt manifeſtly have been the intention of all parties, that the leaſe ſhould be a valid and effectual leaſe. I applaud Lord Chief Juſtice *Wilmot*, for leaving it to the jury, to preſume livery of *ſeiſin* the laſt moment of the day, and if this caſe could be determined that way, I certainly ſhould wiſh for it; but it cannot. If you think you can find a contrariety of authorities, I ſhould be glad to lay hold of it, and ſhould be glad to bring the matter back to common ſenſe and the cleareſt principles of juſtice: adding the word *excluſive*, or *incluſive*, would be deciſive. Then it is a queſtion of conſtruction which word ſhould be implied.

ASTON Juſtice. I think it a very hard caſe; but the authorities are too many to be got over. The caſe in *Wilſon* muſt be a miſtake.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred.

Judgment for the Leſſor of the Plaintiff.

Vide poſt. *Doe ex dim. Pugh* verſus Duke of *Leeds*, *infra*, 724. a very elaborate opinion of the court, in which it was held, that *from the date* and *from the day of the date* may both *include* the day of the date.

Same day.

SCHULDAM *verſus* BUNNISS and another.

Perſons empowered by ſtat. 3 Geo. 3. c. 15. to inſpect the entries of freemen, have a right to inſpect ALL *books*, papers, *&c.* in which the admiſſions of freemen are entered. And where there are *two* or more *Bailiffs*, *&c.* of a Borough or Corporation, a *joint* action will lie, if they refuſe inſpection, though the words of the ſtatute are in the ſingular number, *mayor*, *bailiff*, *&c.*

IN debt for five penalties upon the *Stat.* 3 *G.* 3. *c.* 15. the declaration conſiſted of five counts.

At the trial a verdict was given for the defendants, upon the ſecond count, and for the plaintiff upon all the other counts, ſubject to the opinion of the court, on the following caſe.

"That the borough of *Aldeburgh* ſends members to parliament; that the freemen of the borough become ſuch, either "from a ſervitude of ſeven years apprenticeſhip, or by election; "that the right of electing freemen is in the capital burgeſſes "by act of court, in their corporate aſſemblies, conſiſting of a "certain number of the members of the borough of certain "denominations."

"That there is an *aſſembly book*, in which the election of "officers, the nomination and *admiſſion* of freemen, and all other "acts of court are entered; which book is kept in a cheſt, under "two locks and keys, and is in the cuſtody of the bailiffs of the "borough. That the entries of admiſſions of freemen in this

book expreſs them as being *duly elected*, or as taking by *ſervitude:* but almoſt all the freemen are now *honorary* freemen. That for about eight years laſt paſt, the admiſſions of freemen have not been entered in this book; and the town clerk ſaid, they were ſo omitted by direction; but that ſuch direction was not the order of the court. 1774. SCHULDAM verſus BUNNING.

That there is likewiſe a *ſtampt book*, made and kept by the town clerk, in which the admiſſions of freemen are entered, with the times of their admiſſion; but it does not contain the names and characters of the perſons conſtituting the courts at which the admiſſions were made. That in this book the title to the freedom is not in general ſet out, but there are a few inſtances in which the freemen are ſaid to have been *elected*, and in one or two to have taken up their freedom by *ſervitude*.

That there is likewiſe a copy or duplicate of this book which is kept by the bailiffs.

The town clerk alſo ſaid, that ſince the entry of the admiſſions in the *aſſembly book* had been diſcontinued, he had ſometimes taken a minute of the admiſſions on looſe papers; but that he did not file them or preſerve them in any order, but ſometimes carried them home to his houſe at *Ipſwich*, and ſometimes left them looſe in the *aſſembly book*.

The town clerk likewiſe ſaid, that a diſhoneſt man in his office had it in his power, if he was ſo diſpoſed, to enter fictitious freemen in the *ſtampt book*.

That in *May* 1773, there was an election for one member of parliament; when Mr. *Fonnereau* and the aforeſaid Mr. *Long* were candidates; and there having been a large creation of freemen lately made, by the intereſt of Mr. *Fonnereau*, Mr. *Long* was deſirous of ſeeing whether they were made conſtitutionally; and therefore cauſed the ſeveral demands ſtated in the declaration for the inſpection of the *aſſembly book*, to be duly made, according to the direction of the ſtat. 3 *Geo.* 3. But the defendants refuſed to produce it, or to permit ſuch inſpection; referring the parties demanding the ſame, to the *ſtampt book*, in the hands of the town clerk (of which Mr. *Long* had had a copy before, and in which the late creation was inſerted), or offered to produce the duplicate in their cuſtody, for inſpection.

One of the preſent bailiffs at the trial, though ſubpœnaed for that purpoſe with a *ſubpœna duces tecum*, refuſed to produce the ſaid book at the trial.

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The defendants called no witneſſes; but inſiſted that by the meaning of the *ſtat.* 3 *Geo.* 3 *c.* 15. they had not incurred any penalty by not producing or permitting an inſpection of the aſſembly book. The queſtion was, Whether under the circumſtances of this caſe, the defendants were obliged to produce the aſſembly book within the meaning of the *ſtat.* 3 *Geo.* 3. *c.* 15.

This caſe was argued twice. 1ſt, In this term, by Mr. *Cole* for the plaintiff, and Serjeant *Sayer* for the defendants. Afterwards in *Hilary* term, by Serjeant *Foſter* for the plaintiff, and Mr. *Dunning* for the defendants.

The objections were two; 1ſt, That the ſtampt book was the only book within the meaning of the *ſtat.* 3 *Geo.* 3. 2dly, That the action which was *joint*, ought to have been brought againſt the defendants *ſeparately*.

Serjeant *Sayer* for the defendants. The 1ſt queſtion is, What ſort of inſpection the *ſtat.* 3 *Geo.* 3. *c.* 15. meant to give? And clearly, it meant to give no other than was ſufficient to anſwer the end of the ſtatute; the ſole object of which is, to prevent occaſional freemen from voting at elections: theſe the act deſcribes to be, ſuch perſons as have not been admitted to their freedom twelve calendar months before the election; and to enable the parties to know who are within that deſcription, it provides, "that the mayor, *&c.* ſhall, upon demand of any candidate, his agent, or two freemen, permit ſuch candidate, *&c.* "to inſpect the *books* and *papers*, wherein the admiſſion of freemen "ſhall be entered, *&c.*" But the legiſlature by uſing the words *books* and *papers*, could never intend that a party ſhould inſpect all the books and papers of a corporation for a century back, or any other unlimited time; but only ſuch as contain any entry of freemen admitted as recently as the laſt twelve months. If ſo, the aſſembly book (the ſuppreſſion of which is imputed to the defendants) is not within the purview of the act; for it is in evidence, that no admiſſion whatever had been entered in the aſſembly books for the laſt eight years; that the ſtampt book was the only book in which any entry had been made during that time; conſequently it was the only book which could afford any information on the ſubject of occaſional freemen; and therefore the only one which the parties had a right to inſpect.

2dly, This action ought to have been brought againſt the defendants *ſeparately*; for the words of the ſtatute are, "*mayor*, "*bailiff*," &c. which ſhews, it ought to be brought againſt *every* bailiff, *&c.* offending, in the *ſingular* number; and if the defendants

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defendants might be joined, the ſtatute would be evaded by leſſening the penalty which the party has no right to. Therefore the action is ill brought.

The court ſeemed clear for the plaintiff upon the firſt objection. But thinking the verdict which was taken for five penalties hard and unreaſonable, inclined to liſten to the ſecond, and therefore ordered it to ſtand over for another argument upon this latter objection only.

Upon the ſecond argument Serjeant *Foſter* for the plaintiff: 1ſt, as to the verdict being oppreſſive, the ſtatute meant to give repeated penalties for repeated offences; otherwiſe if a ſingle penalty only could be recovered, the object of the legiſlature would be entirely fruſtrated; becauſe it would well anſwer the purpoſe of a candidate to indemnify the officer for refuſing.

With reſpect to the action being ill brought, becauſe jointly againſt both bailiffs, their *office* is but *one*, and *both* make but *one* officer; therefore the action is well brought againſt them jointly. 11 *Rep.* 2. Auditor *Curle*'s caſe. 1 *Show.* 289. 2 *Mod.* 23. 3 *Lev* 399. *Carth.* 145. *Cro. El.* 625. 8 *Mod.* 303. *Salter* v. *Groſvenor*.

Lord *Mansfield* being called away to the Exchequer chamber, recommended it to *Foſter* to conſult his client *how many penalties* he would inſiſt upon. On Lord *Mansfield*'s return, *Foſter* declared he would be content to take *one only*; whereupon Lord *Mansfield* called upon the counſel for the other ſide to go on.

Mr. *Dunning contra.* The object of this act of parliament is to make the parties offending pay the penalties, and not a perſon who never offended at all. The queſtion is, Whether this action is rightly conceived, which ſuppoſes the bailiffs to have committed a partnerſhip offence, and therefore to be both liable.

With regard to the caſes cited, they all fall within this rule of diſtinction: that where the offence is in the nature of a *treſpaſs*, there it is equally competent to the party injured to bring a *joint* or *ſeparate* action. But where it is an act of *omiſſion*, as in this caſe, the omiſſion of the *one* cannot be conſidered as the omiſſion of the *other*.

Suppoſing a diſtinct refuſal had been proved, it was competent to the party aggrieved to have recovered againſt the bailiff obſtructing, but not againſt the other. Therefore the action ought to have been brought ſeparately againſt each of them.

Lord *Mansfield*. By the act of parliament to prevent occaſional votes, it is provided, that where the right of election is in

1774. freemen, none shall vote unless they shall have been admitted to their freedom twelve calendar months previous to the election; with an exception however as to all those, who are made freemen upon the foundation of inchoate rights; as by birth, marriage, or servitude. In this act there is a clause, upon which the present action is brought. I will read it.

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"And be it further enacted by the authority aforesaid, that "the mayor,* bailiff, sheriff, town-clerk, or other officer of any "corporation, having the custody of, or power over the records "of the same, &c."

You observe from my manner of reading it that this clause is technically penned; and though throughout the kingdom it is well known these offices are executed by more persons than one, and that there are other offices in which many persons are joined, yet this act considers each officer as single, and describes him according to his office.

The present action was brought against the two defendants, as the bailiff of the town of *Aldborough*, for refusing the plaintiff an inspection of the book or books wherein were entered the admission of freemen; and it is brought against them *jointly* as the *bailiff* or persons executing that office. (His Lordship stated the case *verbatim*, and proceeded thus:)

At the trial there was no other question or difficulty than barely whether the assembly book was within the description of the act of parliament. And there can be no doubt as to that; because the act relates to all books which contain the nomination and admission of freemen, and this is such a book, though it is not a book that comes down to late times. But a party may want to know whether other persons have a right by servitude, &c. as well as to discover who are occasional freemen, therefore he has a right to inspect all such books and papers. In this case the stampt book, at best, is but an irregular one. But it did appear to me on the state of the case, that the bailiffs had conceived a doubt upon that point; and having been taught to believe, from the circumstance of the occasional freemen being entered in the stampt book, and the act of parliament operating only upon such freemen as were admitted within a year, that the stampt book was the only book within the meaning of the act, they had proceeded under an apprehension that they were right in refusing an inspection of any other.

* His Lordship laid a stress upon the name of each different officer being in the singular number.

That

That being the light in which I saw their conduct, I did not doubt at all that for several offences several penalties might be recovered; but I thought a verdict for so many penalties hard and unreasonable. No doubt if a party chose to go to the utmost extent and rigour of the act, he might, by repeated demands, raise 10,000 *l.* or a larger sum. I therefore was willing to listen to the objections, and recommended it to the parties to consider whether they would insist upon all the penalties. 1774. SCHULDAM *versus* BUNN 188.

A formal objection which has been made is, Whether the action can be maintained against *both*; and most undoubtedly it may; for the breach of trust in one is a breach of trust in both. But in this case the fact is, that they both refused: therefore there can be no doubt but that they might be charged *jointly*.

Aston Justice. The right given by the act of parliament, is a right of inspecting all books in which the admissions of freemen are inserted: and copies may be taken by the parties applying. And a candidate may not only want them for the purpose of seeing who his adverfaries are; but it may be likewise necessary to him for the purpose of taking copies of the admissions of his own voters. Therefore he has clearly a right to see *all* the books.

With regard to the other question, Whether the action will lie against them jointly; the bailiffs are in law but one officer. If one had opened the books and the other had refused, no action could lie against the latter. But here both refused; and both must answer for the delinquency of both.

Mr. Justice *Willes* and Mr. Justice *Ashhurst* of the same opinion.

Let the *Postea* be delivered to the plaintiff.

CLARKE *versus* SHEE and JOHNSON.

Tuesday, Nov. 22d.

THIS was an action of trespass on the case, wherein the plaintiff declared, that the defendants on the 1st of *June* 1773, at *London*, &c. were indebted to the plaintiff in the sum of 1,000*l.* for divers sums of money to the defendants, by the plaintiff, at the special instance and request of the defendants, before that time lent and advanced. There were two other counts for money laid out and expended, and for *money had and received* by the defendants to the plaintiff's use.

Case for *money had and received*, will lie by the *true owner* of money or notes against a third person, into whose hands they have come *malâ fide*; provided their identity can be traced and ascertained.

To this declaration the defendants pleaded the *general issue*, and thereupon issue was joined.

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SMITH *versus* POWDICH.

" post-office, or the chief offices of *Edinburgh* and *Dublin*; but " that every person shall have free liberty to send and employ " such person or persons as they shall think fit, to carry the said " letters or packets, as aforesaid, without any forfeiture or " penalty therefore; any thing herein contained to the contrary " notwithstanding."

Now there is no general post that goes within 7 or 8 miles of *London*; nevertheless the post-master has always delivered letters within *London* and the contiguous buildings at the established rate of postage: But he never delivered them at *Putney*; that is a strong proof, coeval with the 1st statute which established a rate of postage, that there are boundaries. And this section lays a foundation for me to say, that there is such a line. The legislature forbids all letters to be carried by any other persons under certain circumstances and restrictions; but it appeared necessary, if a place was four or five miles distant from a post-town or stage, that letters should be carried, and the persons carrying them paid for it. And I lay stress on the term *any town or place*. It says " *Town* or *place*;" because there are some stages where there is but a single house, as *Hartfordbridge*; but the town is considered as one spot, and the whole of it is taken as *terminus ad quem*. In the *Gloucester* case, *Stock* v. *Harris*, *Hil.* 11 *G.* 3. *R. B.* the court considered the city of *Gloucester* as the post-town or place, in opposition to limits out of the town; and on that foundation it was held that the post-master had no right to vary the former usage. *Vide* this case since reported 5 *Burr.* 2,709.

In the present case, the post-office contends, that *in* the *town* there is no house that shall not pay an additional sum for the delivery; which is in the highest degree unreasonable, if there is a distinction, which the post-office itself seems to have made, as in *London*; *viz.* in respect to places contiguous to it. The post-town or place is certainly a boundary, within which the post-master is obliged to deliver letters at the rate of postage as established by act of parliament: and here the plaintiff's house is *within* the post-town. But in this case also the defendant has *demanded* the additional charge, as a *duty*, which he has no right to do whatever: So that we might get clear of it upon that ground, as we did in the *Bath* case. But we do not avoid the general question: on the contrary, our decision is expressly upon the general question. If the question is made with a view to controvert the judgment in the Common Pleas, we will defer our opinion to a second

second argument. My distinction does not go to the sending a letter two or three miles out of town. 1774.

SMITH *versus* POWELL.

ASTON Justice. In *Stock* v. *Harris*, the *Gloucester* case, the court decided that the post-master was obliged to *deliver* letters to all persons *in the post town* at the legal rate of postage *only*. The case of *Rowning* v. *Goodchild*, in *C. B.* is a decision upon the general question. A single post-house not in a town might possibly afford a question. But this is a post-town, and I am clearly of opinion, that the post master is bound to deliver all letters within the post-town. If it is necessary to lay any additional charge, there ought to be an application to parliament for the purpose. The post-master cannot impose any sum: I am very well satisfied he has no such right: and with respect to inconvenience, it would be of infinite and general inconvenience to the public at large, if they were obliged to fetch their letters from the post-office; whereas this is only a private and particular inconvenience to the post-master.

WILLES Justice. I am most clearly of the same opinion. The usage in *London* and other great towns has been, to deliver all letters at the houses of the respective inhabitants to whom they are directed. In smaller post-towns the post-master has declined to do so without an additional allowance: probably because there were only a few persons to dispute the right. I think a post-town is different from what the case of a single post-house might be.

The *Bath* case was exactly this case. The defendant demanded the additional sum; and it was there clearly held he had no right to make such demand. So here it is *demanded*. The case of *Gloucester* was decided upon the usage; those two cases, therefore, did not decide the general question: but the case of *Rowning* v. *Goodchild* *, *C. B.* did. And, therefore, I am of opinion upon both grounds, namely, upon the general ground, and likewise upon its being a demand, that judgment should be given for the plaintiff.

* 2 *Black.* Rep. 906.

ASHHURST Justice. I am of the same opinion.

Postea delivered to the plaintiff.

DOE on the demise of Bayntun *versus* WATTON, and another. *Same day.*

IN ejectment, upon not guilty pleaded, the jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case.

That *Jane Bayntun*, being seised in fee of the premises in the declaration mentioned, by her will bearing date *Sept.* 30, 1745.

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1745, duly executed, gave and deviſed the ſame to her nephew *Stucley Bayntun* for life, with remainder to his firſt and other ſons in tail mail, and the iſſue male of the body of ſuch ſons, and in default of ſuch iſſue to her nephew *Henry Bayntun* in like manner, with remainder to her nephew *William Bayntun* the leſſor of the plaintiff in like manner. In which will was contained the following power: "I do hereby declare, elect, and "appoint, and my will and mind is that it ſhall and may be "lawful to and for the ſaid *Stucley Bayntun*, *Henry Bayntun* and "*William Bayntun*, and for each and every of them, at any "time or times, when they ſhall come into the actual poſſeſſion "of the ſaid manors, capital meſſuages, and premiſes hereby "by me given to them as aforeſaid, by any writing or writings "to be ſubſcribed and ſealed by any or either of them, when "poſſeſſed of the ſaid premiſes as aforeſaid, in the preſence of "three witneſſes, at the leaſt, to demiſe, leaſe, or grant the "ſaid premiſes, to each of them hereby granted as aforeſaid, to "any perſon or perſons whatſoever, for the term of one and "twenty years, or under, or for any number or term of years "determinable upon one, two, or three lives, *in poſſeſſion*, and "*not in reverſion*."

That the ſaid *Jane Bayntun* died ſeiſed of the ſaid premiſes; on whoſe death the ſaid *Stucley Bayntun* entered, and in his life time the ſaid *Henry Bayntun* died without iſſue.

That the ſaid *Stucley Bayntun*, on *Jan.* 21ſt 1772, by indenture made and duly executed between the ſaid *Stucley Bayntun* of the one part, and *Anne Surman* of *Chadlington* of the other part, did demiſe all and ſingular the ſaid premiſes in the ſaid ejectment mentioned, to the ſaid *Anne Surman*, to hold unto the ſaid *Anne Surman*, her executors, adminiſtrators, and aſſigns, *from the day of the date* thereof, for and during and unto the full end and term of fourſcore and nineteen years, from thence next enſuing, and fully to be complete and ended, if ſhe the ſaid *Anne Surman*, *Sarah Newman*, and *Edward Newman*, ſon and daughter of *Hannah Newman* of *Chadlington* aforeſaid, any or either of them, ſhould ſo long happen to live, *&c.*

That the ſaid *Stucley Bayntun* died without iſſue.

The queſtion was, Whether upon the whole of this caſe the plaintiff had a right and title to recover?

Mr. *Howorth* for the plaintiff objected, that this leaſe being made to commence *from the day of the date*, was a leaſe in *reverſion* and not in *poſſeſſion*; and therefore not purſuant to the power.

Mr.

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Mr. *Baldwin* for the defendant acknowledged there were a great many authorities againſt him, in caſes of *freehold* demiſes; but none in the caſe of a leaſe under a *power* given. On the contrary, he inſiſted, that the execution of powers have always been conſtrued moſt liberally in favour of the party for whoſe benefit they are intended: and cited *Tollett* verſus *Tollet*, 2 *P. Wms.* 489. where *Baron* having a power to make a jointure by *deed*, did it by *will*, and the court held it a good execution of the power notwithſtanding.

With reſpect to the leaſe being a leaſe in reverſion, as being to commence *from the day of the date*, he cited the caſe of *Lluellen* verſus *Morgan*, cited in 3 *Bulſtrode*, 203. *Bacon* verſus *Waller*; in which firſt caſe it was held, that a leaſe made *habendum a datu* and *a die datûs*, was all one.

In 2 *Salk.* 413. 1 Lord *Raym.* 84. *S. C.* it is laid down that a leaſe to commence *a datu*, *includes* the day of the date.

And in 2 *Wilſon* 165. *Freeman* on demiſe of *Vernon* verſus *Weſt*, the court decided, that a leaſe for lives to begin from the day of the date, and ſeiſin delivered afterwards, is good, and ſhall not be ſaid to convey a freehold to commence *in futuro*: and in a note at the end of the report, it is added, that Mr. Juſtice *Wilmot*, at a former trial in ejectment upon this ſame leaſe, was of opinion, that from the date and from the day of the date, was the very ſame, and both included the day.

ASHHURST Juſtice. Mr. Juſtice *Wilmot* in that caſe left it to the jury to ſay, whether they would not preſume that livery of *ſeiſin* was made ſubſequent to the leaſe.

Mr. *Howorth*. The diſtinction that univerſally prevails through all the caſes is, that a leaſe to commence from the date includes the day, but a leaſe to commence from the day of the date, as in the preſent caſe, excludes the day of the leaſe made: and the caſe of the Counteſs of *Portland*, in the *Exchequer*, is in point. It was argued four times and finally adjudged. The caſe cited from *Wilſon* muſt be a miſtake.

Lord MANSFIELD. I think it muſt be ſo, and the other authorities are, I am afraid, too ſtrong to get over. At the ſame time I am ſorry that there ever exiſted a determination, which avoided a fair leaſe, by conſtruing from the day of the date, to exclude the day of the date; becauſe it may be taken either way. It would have been a very right principle of law to have ſaid, if the one conſtruction will render the leaſe good, and the other

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will make it void, the conſtruction which makes the leaſe good ſhall prevail; becauſe it muſt manifeſtly have been the intention of all parties, that the leaſe ſhould be a valid and effectual leaſe. I applaud Lord Chief Juſtice *Wilmot*, for leaving it to the jury, to preſume livery of *ſeiſin* the laſt moment of the day, and if this caſe could be determined that way, I certainly ſhould wiſh for it; but it cannot. If you think you can find a contrariety of authorities, I ſhould be glad to lay hold of it, and ſhould be glad to bring the matter back to common ſenſe and the cleareſt principles of juſtice: adding the word *excluſive*, or *incluſive*, would be deciſive. Then it is a queſtion of conſtruction which word ſhould be implied.

ASTON Juſtice. I think it a very hard caſe; but the authorities are too many to be got over. The caſe in *Wilſon* muſt be a miſtake.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred.

Judgment for the Leſſor of the Plaintiff.

Vide poſt. *Doe ex dim. Pugh* verſus Duke of *Leeds*, *infra*, 724. a very elaborate opinion of the court, in which it was held, that *from the date* and *from the day of the date* may both *include* the day of the date.

Same day.

SCHULDAM *verſus* BUNNISS and another.

Perſons empowered by ſtat. 3 Geo. 3. c. 15. to inſpect the entries of freemen, have a right to inſpect ALL *books*, papers, *&c.* in which the admiſſions of freemen are entered. And where there are *two* or more *Bailiffs*, *&c.* of a Borough or Corporation, a *joint* action will lie, if they refuſe inſpection, though the words of the ſtatute are in the ſingular number, *mayor*, *bailiff*, *&c.*

IN debt for five penalties upon the *Stat.* 3 *G.* 3. *c.* 15. the declaration conſiſted of five counts.

At the trial a verdict was given for the defendants, upon the ſecond count, and for the plaintiff upon all the other counts, ſubject to the opinion of the court, on the following caſe.

"That the borough of *Aldeburgh* ſends members to parliament; that the freemen of the borough become ſuch, either "from a ſervitude of ſeven years apprenticeſhip, or by election; "that the right of electing freemen is in the capital burgeſſes "by act of court, in their corporate aſſemblies, conſiſting of a "certain number of the members of the borough of certain "denominations."

"That there is an *aſſembly book*, in which the election of "officers, the nomination and *admiſſion* of freemen, and all other "acts of court are entered; which book is kept in a cheſt, under "two locks and keys, and is in the cuſtody of the bailiffs of the "borough. That the entries of admiſſions of freemen in this

book expreſs them as being *duly elected*, or as taking by *ſervitude:* but almoſt all the freemen are now *honorary* freemen. That for about eight years laſt paſt, the admiſſions of freemen have not been entered in this book; and the town clerk ſaid, they were ſo omitted by direction; but that ſuch direction was not the order of the court. 1774. SCHULDAM verſus BUNNISS.

That there is likewiſe a *ſtampt book*, made and kept by the town clerk, in which the admiſſions of freemen are entered, with the times of their admiſſion; but it does not contain the names and characters of the perſons conſtituting the courts at which the admiſſions were made. That in this book the title to the freedom is not in general ſet out, but there are a few inſtances in which the freemen are ſaid to have been *elected*, and in one or two to have taken up their freedom by *ſervitude*.

That there is likewiſe a copy or duplicate of this book which is kept by the bailiffs.

The town clerk alſo ſaid, that ſince the entry of the admiſſions in the *aſſembly book* had been diſcontinued, he had ſometimes taken a minute of the admiſſions on looſe papers; but that he did not file them or preſerve them in any order, but ſometimes carried them home to his houſe at *Ipſwich*, and ſometimes left them looſe in the *aſſembly book*.

The town clerk likewiſe ſaid, that a diſhoneſt man in his office had it in his power, if he was ſo diſpoſed, to enter fictitious freemen in the *ſtampt book*.

That in *May* 1773, there was an election for one member of parliament; when Mr. *Fonnereau* and the aforeſaid Mr. *Long* were candidates; and there having been a large creation of freemen lately made, by the intereſt of Mr. *Fonnereau*, Mr. *Long* was deſirous of ſeeing whether they were made conſtitutionally; and therefore cauſed the ſeveral demands ſtated in the declaration for the inſpection of the *aſſembly book*, to be duly made, according to the direction of the ſtat. 3 *Geo.* 3. But the defendants refuſed to produce it, or to permit ſuch inſpection; referring the parties demanding the ſame, to the *ſtampt book*, in the hands of the town clerk (of which Mr. *Long* had had a copy before, and in which the late creation was inſerted), or offered to produce the duplicate in their cuſtody, for inſpection.

One of the preſent bailiffs at the trial, though ſubpœnaed for that purpoſe with a *ſubpœna duces tecum*, refuſed to produce the ſaid book at the trial.

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The defendants called no witneſſes; but inſiſted that by the meaning of the *ſtat.* 3 *Geo.* 3 *c.* 15. they had not incurred any penalty by not producing or permitting an inſpection of the aſſembly book. The queſtion was, Whether under the circumſtances of this caſe, the defendants were obliged to produce the aſſembly book within the meaning of the *ſtat.* 3 *Geo.* 3. *c.* 15.

This caſe was argued twice. 1ſt, In this term, by Mr. *Cole* for the plaintiff, and Serjeant *Sayer* for the defendants. Afterwards in *Hilary* term, by Serjeant *Foſter* for the plaintiff, and Mr. *Dunning* for the defendants.

The objections were two; 1ſt, That the ſtampt book was the only book within the meaning of the *ſtat.* 3 *Geo.* 3. 2dly, That the action which was *joint*, ought to have been brought againſt the defendants *ſeparately*.

Serjeant *Sayer* for the defendants. The 1ſt queſtion is, What ſort of inſpection the *ſtat.* 3 *Geo.* 3. *c.* 15. meant to give? And clearly, it meant to give no other than was ſufficient to anſwer the end of the ſtatute; the ſole object of which is, to prevent occaſional freemen from voting at elections: theſe the act deſcribes to be, ſuch perſons as have not been admitted to their freedom twelve calendar months before the election; and to enable the parties to know who are within that deſcription, it provides, "that the mayor, *&c.* ſhall, upon demand of any candidate, his agent, or two freemen, permit ſuch candidate, *&c.* "to inſpect the *books* and *papers*, wherein the admiſſion of freemen "ſhall be entered, *&c.*" But the legiſlature by uſing the words *books* and *papers*, could never intend that a party ſhould inſpect all the books and papers of a corporation for a century back, or any other unlimited time; but only ſuch as contain any entry of freemen admitted as recently as the laſt twelve months. If ſo, the aſſembly book (the ſuppreſſion of which is imputed to the defendants) is not within the purview of the act; for it is in evidence, that no admiſſion whatever had been entered in the aſſembly books for the laſt eight years; that the ſtampt book was the only book in which any entry had been made during that time; conſequently it was the only book which could afford any information on the ſubject of occaſional freemen; and therefore the only one which the parties had a right to inſpect.

2dly, This action ought to have been brought againſt the defendants *ſeparately*; for the words of the ſtatute are, "*mayor*, "*bailiff*," &c. which ſhews, it ought to be brought againſt *every* bailiff, *&c.* offending, in the *ſingular* number; and if the

defendants

defendants might be joined, the ſtatute would be evaded by leſſening the penalty which the party has no right to. Therefore the action is ill brought. 1774. SCHUL-DAM *verſus* BUNBURY.

The court ſeemed clear for the plaintiff upon the firſt objection. But thinking the verdict which was taken for five penalties hard and unreaſonable, inclined to liſten to the ſecond, and therefore ordered it to ſtand over for another argument upon this latter objection only.

Upon the ſecond argument Serjeant *Foſter* for the plaintiff: 1ſt, as to the verdict being oppreſſive, the ſtatute meant to give repeated penalties for repeated offences; otherwiſe if a ſingle penalty only could be recovered, the object of the legiſlature would be entirely fruſtrated; becauſe it would well anſwer the purpoſe of a candidate to indemnify the officer for refuſing.

With reſpect to the action being ill brought, becauſe jointly againſt both bailiffs, their *office* is but *one*, and *both* make but *one* officer; therefore the action is well brought againſt them jointly. 11 *Rep.* 2. Auditor *Curle*'s caſe. 1 *Show.* 289. 2 *Mod.* 23. 3 *Lev* 399. *Carth.* 145. *Cro. El.* 625. 8 *Mod.* 303. *Salter* v. *Groſvenor.*

Lord *Mansfield* being called away to the Exchequer chamber, recommended it to *Foſter* to conſult his client *how many penalties* he would inſiſt upon. On Lord *Mansfield*'s return, *Foſter* declared he would be content to take *one only*; whereupon Lord *Mansfield* called upon the counſel for the other ſide to go on.

Mr. *Dunning contra.* The object of this act of parliament is to make the parties offending pay the penalties, and not a perſon who never offended at all. The queſtion is, Whether this action is rightly conceived, which ſuppoſes the bailiffs to have committed a partnerſhip offence, and therefore to be both liable.

With regard to the caſes cited, they all fall within this rule of diſtinction: that where the offence is in the nature of a *treſpaſs*, there it is equally competent to the party injured to bring a *joint* or *ſeparate* action. But where it is an act of *omiſſion*, as in this caſe, the omiſſion of the *one* cannot be conſidered as the omiſſion of the *other*.

Suppoſing a diſtinct refuſal had been proved, it was competent to the party aggrieved to have recovered againſt the bailiff obſtructing, but not againſt the other. Therefore the action ought to have been brought ſeparately againſt each of them.

Lord *Mansfield*. By the act of parliament to prevent occaſional votes, it is provided, that where the right of election is in

1774. "*now be done, by the aſſembly of the iſland, or by an act of the* "*parliament of Great Britain.*"

HALL *verſus* CAMPBELL.

The conſequence is, judgment muſt be given for the plaintiff.

ELDRIDGE *verſus* KNOTT and Others.

More length of time, ſhort of the period fixed by the *ſtat.* of limitations, and *unaccompanied* with any *circumſtances*, is *not* of *itſelf* a ſufficient ground to preſume a releaſe or extinguiſhment of a quit rent.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Mr. Juſtice *Aſhhurſt* reported from Baron *Eyre* as follows: this was an action of treſpaſs for breaking and entering the plaintiff's houſe, and deſtroying his goods. Plea not guilty. Verdict for the plaintiff.

The defendants were bailiffs of *Dennis Rolle*, Eſq.; lord of the manor of *Eaſt Suderly* and *Lockerly* in the county of *Wilts*; and the treſpaſs complained of, was for taking a diſtreſs for quit-rents due to the lord, in right of this manor. Upon evidence it appeared, that till the the year 1736, a quit rent had been regularly paid to the reſpective lords of this manor, for the tenement in queſtion. That in the year 1738, a demand was made and refuſed; ſince which time there had been no further demand, nor had any payment been made, till within theſe few years, from the year 1736 to the time of the preſent action. That in 1736, an action was tried between the lord of the manor, and the owner of the tenement in queſtion, for cutting down two timber trees growing thereon; when a verdict was given for the tenant: ſince which the owners of the tenement in queſtion had refuſed to pay this quit rent, or to attend the lord's court.

Upon theſe facts Mr. Baron *Eyre* was of opinion, that though the claim of the defendant was not barred by the *ſtat.* of limitations, yet, that a non-payment and acquieſcence for 37 years, was a ſufficient ground to preſume a releaſe or extinguiſhment of the quit-rent; and left it to the jury to ſay, whether, upon the evidence, they would or would not preſume it was ſo releaſed or extinguiſhed: and the jury found it was.

Mr. *Buller* had moved for a new trial upon the ground of this being a miſdirection of the judge, and that the verdict was againſt evidence.

Mr. Serjeant *Davy* and Mr. *Kirby* ſhewed for cauſe; that though there was no caſe exactly in point, yet by analogy to the reaſoning and deciſion of the court in a variety of caſes, the direction of the judge in this caſe, was clearly a right direction.

In

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In 1. *Burr.* 434. a case is cited by the court, where payment of a bond was presumed within 18 years. So in *Quo. War.* circumstances may make it reasonable to refuse an information *within* 20 years. Even a grant from the crown has been presumed, which must be by matter of record, though such record did not appear *.

* *Vide* Mayor of *Hull* versus *Horner*, *ante*, 102.

In this case there has been an acquiescence for 34 years, and such acquiescence not merely *tacit*, but after a demand made and a refusal given: therefore the defendant ought to shew some reason why, after such refusal, no subsequent demand was made, till just upon the eve of the present action; or the court will think, with the judge who tried the cause, that there is ground to presume he has released his right.

Mr. *Mansfield, contra.* In all the instances which have been mentioned, the length of time has been accompanied with circumstances: but here there are no circumstances; only mere non-payment. On the other hand, the quit-rent had been regularly paid till the year 1736. In 1738 it is demanded, and a refusal given; but the demand, at that time, is a strong proof that no conveyance or release of it had been made since the last payment; if there had been, the tenant would have assigned it as a cause of refusal; but no such reason is assigned. If no circumstances appear, the fact of non-payment alone is not of itself a sufficient ground to support the presumption contended for; if it were, the statute would be of no effect at all.

Lord MANSFIELD stopt him. The statute of limitations is a positive bar from length of time; and operates so conclusively, that although the jury and the court are satisfied that the claim set up subsists, yet they are bound by the statute to defeat the claim.

There are many cases not within the statute, where from a principle of quieting possession the court has thought that a jury should presume any thing to support a length of possession.

Lord COKE says somewhere, that an act of parliament may be presumed; and of late it has been held, that even in the case of the crown, which is not bound by the statutes of limitation, a grant may be presumed from great length of possession. It was so done in the case of the corporation of *Hull* and *Horner* *: not that, in such cases, the court really thinks a grant has been made; because, it is not probable a grant should have existed, without its being upon record; but they presume the fact, for the purpose and from a principle of quieting the possession.

* *vide ante*, 102.

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But there is no inſtance of ſetting up any length of time within the limitation fixed by the ſtatute, as a *bar* to the demand: and in caſes of quit-rents, like the preſent, the reaſon for carrying back the limitation to the period fixed by the ſtatute, namely 50 years, is the ſtronger; becauſe the conſideration is ſo trifling. Though if a real ground for ſuppoſing a releaſe or extinguiſhment appeared, the ſmallneſs of the claim would have no weight. But in this caſe there is *mere length of time*, which, barely *as ſuch*, ought not to be received as a *bar*: and if ſo, the caſe ſtands without a pretence for ſuppoſing a releaſe or extinguiſhment. Becauſe, on the other hand, the exact time when the payment was firſt refuſed is in proof; and further, the real or more probable ground of ſuch refuſal appears; namely, that the tenant had ſucceeded in an action between him and his lord; not that the lord had releaſed it by any conveyance, or the like: and if ſo, it might be a good while before the lord might think proper to bring an action for *half a crown*. Therefore I am of opinion, that, upon the evidence, it ought not to have been left to a preſumption of law, within a leſs time than the period fixed by the ſtatute.

ASTON Juſtice. A preſumption from mere length of time, which is to ſupport a right, is very different from a preſumption to defeat a right: here, the preſumption is to defeat the right of the lord to a ſmall payment of half a crown, within the 50 years limited by the ſtatute; and therefore, upon mere length of time, unaccompanied with other circumſtances, ſuch limitation ought not to be altered and another ſet up. Beſides, in this caſe, there is reaſon to ſay, that a different foundation of refuſal, than that which it is contended ſhould be preſumed, appears; which is, that the tenant had defeated the lord in a law-ſuit depending between them: therefore, I am of opinion that the preſumption is defective, and that a new trial ſhould be granted.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt*, were of the ſame opinion.

Per Cur. Rule for a new trial made abſolute.

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Thurſday, Nov. 22d.

DOE ex dim. FISHAR and Wife, and TAYLOR and Wife, *verſus* PROSSER.

36 years ſole and uninterrupted poſſeſſion by *one tenant in common*, without any account to or demand made, or claim ſet up by his *companion*, held a ſufficient ground for a jury to *preſume* an *actual ouſter*, of the co-tenant.

UPON a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* reported as follows:

This was an ejectment brought by the plaintiff for an undivided moiety of certain lands in *Enfield*, in the county of *Middleſex*. The leſſors of the plaintiff claimed title under *Mary Taylor*, who was *tenant* in tail *in common*, of the lands in queſtion, with her ſiſter under the will of one *Perkins*. The ſiſter was married to *Stevens*, after which, in the year 1705, there was a deed of partition, between *Mary Taylor* and *Stevens*, for the life of *Stevens*; by which deed all the lands in *Enfield* were allotted to him, and under which he enjoyed them till the year 1734, when he died: *Mary Taylor* died ſome years before.

From the year 1734, one tenant in common namely, the wife of *Stevens*, had been in the ſole poſſeſſion of theſe lands, without any claim or demand by any perſon or perſons claiming under *Mary Taylor*, deceaſed, the other tenant in common. No *actual ouſter* was proved; but upon the circumſtances, I left it to the jury to ſay, whether there was not ſufficient evidence before them to preſume an *actual ouſter*; and ſuppoſing there was an *actual ouſter*, in that caſe, the leſſors of the plaintiff were barred by the ſtatute of limitations. The jury found that there *was* ſufficient evidence to preſume an *actual ouſter*.

Mr. *Dunning* and Mr. *Barnes*, for the plaintiff. It is a general rule of law, that the poſſeſſion of one tenant in common, is the poſſeſſion of both; and there is no ground for any diſtinction in this caſe, ſo as to take it out of the general rule. If an *actual ouſter* had been proved, the caſe would have been different. But here, no evidence whatſoever is given of any *actual ouſter*, or of a tortious poſſeſſion: on the contrary, it appears that the poſſeſſion was only by permiſſion of his companion, and as a conſequence of ſuch permiſſion he received the rents and profits. But the bare perception of rents and profits, is no *ouſter*; and without an *actual ouſter*, the ſtatute of limitations is no bar againſt a tenant in common. To this purpoſe they cited *Reading* verſus *Royſton*, 2 *Salk.* 423. reported likewiſe in 2 Lord *Raym.* 830. *Fairclaim* ex dim. *Empſon* verſus *Shackleton*. *Eaſt.* 10 *Geo.* 3. reported ſince in 5 *Burr.* 2,604, and in 2 *Blackſtone Rep.* 690.

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Mr. *Wallace* and Mr. *Widmore*, *contra*, for the defendants, admitted, that where there is no *ouſter*, the ſtatute of limitations does not bar the other tenant in common. But here the jury have found an *actual ouſter*, and the only queſtion is, whether they were warranted in ſo doing.—As to the caſe of *Empſon* verſus *Shackleton*, no expulſion or *ouſter* was found in that caſe; the ſingle queſtion was, whether the plaintiff was barred by the ſtatute of limitations, after a poſſeſſion of 26 years; and the court held he was not: but Lord *Mansfield* there ſaid, if a queſtion had been made at the trial, whether the plaintiff was *ouſted*, it might have been a fact to have been left to the jury. Here the queſtion was made, and the circumſtances left to the jury were ſufficient in point of law for them to preſume an *actual ouſter*; namely, an uninterrupted poſſeſſion and receipt of the rents and profits for 40 years. To this point they cited 12 *Mod.* 658, 659. 1 Lord *Raym.* 310.

Lord MANSFIELD. It is very true that I told the jury, they were warranted by the length of time in this caſe, to preſume an *adverſe* poſſeſſion and *ouſter* by one of the tenants in common, of his companion; and I continue ſtill of the ſame opinion—Some ambiguity ſeems to have ariſen from the term "*actual ouſter*," as if it meant ſome act accompanied by real force, and as if a turning out by the ſhoulders were neceſſary. But that is not ſo. A man may come in by a rightful poſſeſſion, and yet hold over *adverſely* without a title. If he does, ſuch holding over, under circumſtances, will be equivalent to an *actual ouſter*. For inſtance, length of poſſeſſion during a particular eſtate, as a term of one thouſand years, or under a leaſe for lives, as long as the lives are in being, gives no title: But if tenant *pur autre vie* hold over for 20 years after the death of *ceſtuy que vie*, ſuch holding over will in ejectment be a complete bar to the remainder man or reverſioner; becauſe it was *adverſe* to his title. So in the caſe of tenants in common: the poſſeſſion of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; becauſe ſuch poſſeſſion is not adverſe to the right of his companion, but in ſupport of their common title; and by paying him his ſhare, he acknowledges him co-tenant. Nor indeed is a *refuſal* to *pay* of *itſelf* ſufficient, *without denying* his *title*. But if, upon demand by the co-tenant of his moiety, the other *denies to pay*, and *denies his title*, ſaying he claims the whole and will not pay, and continues in poſſeſſion; ſuch poſſeſſion is adverſe and *ouſter* enough. The queſtion then is, whether the poſſeſſion in this caſe, after the death of *Stevens*,

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in the year 1734; that is, after the particular eſtate ended, was a poſſeſſion as tenant in common, *eo nomine* or adverſe?

It is a poſſeſſion of near 40 years, which is more than quadruple the time given by the ſtatute for tenants in common to bring their action of account if they think proper; namely, ſix years: But in this caſe no evidence whatſoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the leſſors of the plaintiff, or of any acknowledgment of the title in them, or in thoſe under whom they would now ſet up a right. Therefore I am clearly of opinion, as I was at the trial, that an undiſturbed and quiet poſſeſſion for ſuch a length of time is a ſufficient ground for the jury to preſume an *actual ouſter*, and that they did right in ſo doing.

Aſton Juſtice. There have been frequent diſputes as to how far the poſſeſſion of one tenant in common ſhall be ſaid to be the poſſeſſion of the other, and what acts of the one ſhall amount to an *actual ouſter* of his companion. As to the firſt, I think it is only where the one holds poſſeſſion as *ſuch*, and receives the rents and profits on account of *both*. With reſpect to the ſecond, if no *actual ouſter* is proved, yet it may be inferred from circumſtances, which circumſtances are matter of evidence to be left to a jury. Now in this caſe, there has been a *ſole* and quiet poſſeſſion for 40 years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverſe poſſeſſion or *ouſter*, if the uninterrupted receipt of the rents and profits without account for near 40 years is not?

Willes Juſtice. This caſe muſt be determined upon its own circumſtances. The poſſeſſion is a poſſeſſion of 16 years above the 20 preſcribed by the ſtatute of limitations, without any claim, demand, or interruption whatſoever; and therefore, after a peaceable poſſeſſion for ſuch a length of time, I think it would be dangerous now to admit a claim to defeat ſuch poſſeſſion. However ſtrict the notion of *actual ouſter* may formerly have been, I think adverſe poſſeſſion is now evidence of *actual ouſter*: and therefore entirely agree that under the circumſtances which appeared at the trial, it was very properly left to the jury to preſume an *actual ouſter* in this caſe.

Aſhhurſt Juſtice. I am entirely of the ſame opinion. Here is a poſſeſſion of near 40 years, without any claim by the leſſors of the plaintiff to a ſhare of the rents and profits, and without any acknowledgment of his right, by the other tenant in common.

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After ſo long an acquieſcence I think the jury were well warranted to preſume any thing in ſupport of the defendant's title, and they might preſume, either an *actual ouſter* or a *conveyance*. With reſpect to the caſe of *Fairclaim* ex dim. *Empſon* verſus *Shackleton*, the preſent queſtion was not properly before the court in that caſe. The ſingle queſtion there was, Whether the plaintiff was barred by the ſtatute of limitations. The poſſeſſion was a poſſeſſion of 26 years; but in that caſe it was not left to the jury to preſume either an adverſe poſſeſſion or an *actual ouſter*. That fact therefore was not found, and it is not the province of the court, but of the jury to preſume facts. But here it was left to the jury, and the jury have preſumed an *actual ouſter*; and I think that after a quiet uninterrupted and undiſturbed poſſeſſion of 40 years, they were well warranted in ſo doing.

Rule for a new trial diſcharged.

Wedneſday, Nov. 23d.

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THIS was an information in the nature of a *quo warranto*, againſt the defendant, to ſhew by what authority he claimed to exerciſe the office of burgeſs of the borough of *Portſmouth*.

The information alleged, and it was admitted in the plea, that this *office* and franchiſe of a *burgeſs* has been, and ſtill is, a place, *office*, and *franchiſe* of great *truſt* and *pre-eminence* within the ſaid borough, *touching the rule and government of the ſaid borough, and the adminiſtration of public juſtice*. The plea then ſet forth, that within the ſaid borough there have been, and now of right ought to be, an *indefinite number of burgeſſes*. That by a charter, 3 *Car.* 1. the mayor, aldermen, and burgeſſes were incorporated under the name and title of the mayor, aldermen, and burgeſſes of the borough of *Portſmouth*. That the charter nominated the firſt mayor, and twelve perſons to be aldermen, and then grants "that it ſhould and might be lawful for the mayor "and aldermen, &c. or the major part of them, from time "to time, and at all times then after, for ever, when, and "as often as it ſhould appear to them to be fit and neceſſary, to "name ſo many and ſuch perſons to be burgeſſes as they ſhould "pleaſe, and to the ſaid burgeſſes, ſo choſen, to adminiſter an "oath for their faithfully executing the ſaid office of burgeſs." The plea further ſtated, that this charter was accepted by the then mayor and burgeſſes of the ſaid borough, and that the defendant

fendant on the 18th day of *May* 1751, was *elected* by the *major part* of the mayor and aldermen of the ſaid borough; and that *before* he took upon himſelf to exerciſe the place, office, and franchiſe of ſuch burgeſs, he was duly, and according to the uſage of the ſaid borough, ſworn into the ſaid office.

The replication ſet forth other parts of the charter, which give the corporation a power to take lands, and to make by-laws; and then ſtated, that the mayor, aldermen, and burgeſſes, or the major part of them, from time to time, ſhould have power to aſſemble themſelves annually, every *Monday* ſevennight before the feaſt of *St. Michael* the arch-angel, and name one of the aldermen to be mayor. That a court of record was appointed by the ſaid charter, to be held before the mayor, recorder, and aldermen of, *&c.* or any four of them; and alſo a court leet to be holden before the mayor, or recorder, or aldermen. And that the mayor and recorder, and every mayor for one year after his mayoralty, and three of the aldermen, to be choſen as aforementioned, ſhould be juſtices in the ſaid borough. That a court of *oyer* and *terminer* was alſo appointed by the ſaid charter, to be held by the mayor, recorder, and three aldermen, as aforeſaid. Laſtly, the replication ſtated that the defendant at the time of his ſuppoſed election to be a burgeſs, *&c.* was of the age of *five years* and *ten* months, and *no more.*

Rejoinder. That at the time the defendant was ſworn into the place, office, and franchiſe of one of the burgeſſes, *&c.* he was of the *full age* of *twenty-one* years. To this the plaintiff demurred.

Mr. *Buller, pro rege.* Upon this record there are three queſtions. 1ſt. Whether the office of burgeſs is a judicial or a miniſterial office? 2dly. If judicial, Whether an infant, ſuch as the defendant was, is eligible to ſuch an office? 3dly, If miniſterial, Whether an infant, ſuch as the defendant was, is eligible to ſuch an office?

As to the *firſt* queſtion, it is admitted by the plea, that the office of burgeſs is an office of great *truſt* and *pre-eminence, touching the rule and government of the ſaid borough,* and the *adminiſtration* of public *juſtice* within the ſame. This alone is deciſive that it is a judicial office; for every thing which relates to the adminiſtration of public juſtice is a judicial office. But beſides this, it appears by the record, that the burgeſſes are to chuſe the mayor, who is the principal officer in the borough, a juſtice of peace, judge of the court of record, of the court leet, and

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and of the court of oyer and terminer. Therefore upon these grounds it is clearly a judicial office.

II. Question. Supposing this is a judicial office, whether an infant is eligible to it? No authority can be cited to shew that he is eligible, but there are many which decide he is not. *Plowd. Com.* 379. 381.—9 *Co.* 48. 97. These authorities say, an infant seems capable of holding such offices as do not concern the administration of justice, but only require skill and diligence, such as the office of park-keeper, forester, gaoler, *&c.* But a distinction is made with regard to offices of confidence as this is, and which does concern the administration of justice.—In *Scambler* versus *Walter*, cited in *Cro. Car.* 556. it was held, that the grant of the office of an *under-stewardship* in possession or reversion to an infant is void; because he is incapable thereof, not having knowledge to execute it *pro commodo regis et populi.* *Co. Litt.* 3. *b.* 8. *P.*—An infant cannot be sworn on an inquest. *Co. Litt.* 157. 172. *b.*—Nor be elected a member of parliament. 4 *Inst.* 47. For all these are offices of skill and confidence, or concern the administration of justice.

Upon shewing cause against this information it was said, that it has been taken for granted ever since the case in the year book, 21 *Ed.* 4. 12. *B.* that an infant may be chosen mayor. But there the infancy of the mayor was not in question, but only whether the body corporate should avoid their own deed, on account of a defect they were well acquainted with; namely, the imprisonment of the mayor; and it was held they should.

If these two points are with the prosecutor, the third is unnecessary; but if necessary to enter into it, an infant under years of discretion, is not capable of taking a ministerial office, unless he can act by deputy; nor an office where an oath is required. He cannot be an attorney, because he cannot appoint a deputy. *March, Rep.* 31. nor be sworn; *March* 92. So with respect to other acts, or offices where an oath is required. *Co. Litt.* 3. *b.* *Cro. Car.* 556. *Co. Litt.* 65. *b.* In the present case it was necessary for the defendant to take the oaths of allegiance and supremacy, and likewise the oath of office appointed by the charter faithfully to execute all things which belong to the office of burgess. But at the time of his election, he was of such a tender age, that the law will not allow him the smallest title to discretion whatsoever, *videlicet*, *under* the age of *seven* years. At this age, an infant cannot be guilty of felony, *whatever circumstances proving discretion may appear*; for from presumption

of law, he cannot have diſcretion, and no averment ſhall be received againſt that preſumption. 1 *H. H. P. C.* 23. 1774.

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Laſtly, The inconvenience and miſchief of admitting infants of ſuch an age, would be fatal to almoſt all the corporations in *England*; every borough would become a monopoly, and the inſtant an alderman's ſon had breath, he would be a burgeſs, and no others would be admitted. If one infant may be a burgeſs, others may; ſo that all, or the greater part of the burgeſſes might be infants in their cradles, by which means one integral part of the body would be loſt or at leaſt ſuſpended. The king's charter would be perverted, and the power which he had delegated to many, would be confined to the hands of a few. Many corporations would be wholly diſſolved; for no function in which the concurrence of burgeſſes was neceſſary could be exerciſed, till ſome of this body of childhood had attained the age of 21 years. In the caſe of this borough neither mayor nor juſtices during the infancy of the burgeſſes could be elected. The inconvenience of ſuſpending the powers of corporations, were ſo fully ſeen by the gentlemen on the other ſide, that on ſhewing cauſe againſt this information, it was thought neceſſary by ſome of them to contend, there was no reaſon why they ſhould not be admitted, and act during their infancy. But this I truſt is ſufficiently anſwered; for they have neither diſcretion to act, nor capacity to take oaths, both which are required by law.

Mr. *Davenport*, *contrà*. An infant is eligible to the office of burgeſs, though he cannot act till of full age.

The 1ſt objection is, that this is admitted on record to be an office of truſt and pre-eminence, and touching the adminiſtration of juſtice. As to the former part of this allegation, they are words of courſe in every information; and with reſpect to the latter, it is difficult to underſtand what is meant by *touching the adminiſtration of juſtice*. For the power of the burgeſſes to elect the mayor, or the three juſtices of peace appointed by the charter to do judicial acts, is not their adminiſtration of juſtice. The conſequence of denying it in the plea would have been, that it muſt have been tried; and then a ſpecial verdict muſt have ſtated to the court in what degree the office related to the adminiſtration of juſtice. It behoved the proſecutor therefore, in the firſt inſtance, to have ſhewn this to the court, if he meant to rely on it as a ſerious objection.

But ſuppoſing the fact to be as admitted by the plea, it does not follow that every office which affects the adminiſtration of juſtice,

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juſtice, is therefore a judicial office. The office of *ſheriff* touches the adminiſtration of juſtice, yet in many places it is hereditary, and conſequently tenable by an infant. A *ſerjeant at mace*, like every other officer of the court, is concerned in the adminiſtration of juſtice, yet his office is not judicial. Therefore every office which concerns the adminiſtration of juſtice is not a judicial office.

As to the capacity of infants to hold ſuch offices, in all caſes, where it is not requiſite for the *elected* inſtantly to execute the office in perſon, but may act by ſufficient deputy, an infant is eligible.—As to the caſe of *Scambler* verſus *Walter*, cited in *Young* verſus *Fowler*, *Cro. Car.* 556. it is in the ſame page held, that an infant is capable of holding the office of *regiſter* of the dioceſe of *Rocheſter*. It is taken for granted too in that caſe, that an infant may be *warden* of the *Fleet*: now the office of warden of the *Fleet* greatly touches the adminiſtration of juſtice. There clearly, therefore, is nothing in that objection.

The caſe in the year book, 21 *Ed.* 4. is in favour of the defendant, for it is there ſaid a corporation may elect an infant mayor. If he may be *mayor*, *a fortiori* he may be a *burgeſs*; for in this corporation he cannot be mayor without firſt having ſerved the office of burgeſs.

As to the incapacity of infants to be elected members of parliament, the *ſtat.* 7. & 8 *Will.* 3. is the firſt ſtatute which prohibits their being choſen. The only inference, therefore, is, that before that time they were eligible, otherwiſe the ſtatute was unneceſſary. With reſpect to the oath required by the charter no ſuch oath is required to be taken by a burgeſs, but only a power given to the mayor and aldermen, to adminiſter an oath; for the words are "that it ſhall and may be lawful for the mayor and "aldermen to name ſo many and ſuch perſons to be burgeſſes "as they ſhould pleaſe, and to the ſaid burgeſſes ſo choſen, to "adminiſter an oath, *&c.*"

The crown might in the original grant have nominated an infant to be mayor or burgeſs; and if ſo, thoſe to whom the right of the crown is delegated, have the ſame power. But ſuppoſing an oath were neceſſary, an infant who is choſen a burgeſs is not obliged to be inſtantly ſworn in. If he is adult at the time he takes upon himſelf to act, it is ſufficient. Perſons who are reſident abroad, and conſequently cannot be immediately ſworn in, are nevertheleſs eligible. In many corporations perſons are burgeſſes by birth. Titles by ſervitude, or marriage

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of a burgeſs's daughter, are not unfrequent before the age of 21. And in ſome it is cuſtomary to ſwear them in, at the age of 20, as in *Newcaſtle*. In ſhort, no principle of law is more clear, than that an *inchoate* right to be a burgeſs may veſt in an *infant*, and where ſuch right does veſt, a *mandamus* will lie to ſwear him in, at the legal age of 21, or ſuch other time as cuſtom may have eſtabliſhed. No authority has been cited to the contrary; all the objections which have been made, are founded upon matter ſubſequent to the act of their being elected; but they are not ſufficient to bar the right of an infant, who has by law a capacity to take any thing which does not affect the commonwealth. In this caſe it is apparent upon the record, that there can be no neceſſity for his acting as ſoon as he is elected; for the number of burgeſſes are by the charter made *indefinite*; and if the number of infants ſhould be too great, a ſufficient number of perſons qualified to hold the neceſſary offices of the corporation, may at any time be added; conſequently no inconvenience can ariſe from infants being elected, and as there is no law againſt it, the defendant is well entitled.

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Lord *Mansfield*. A great variety of learning has been gone into on both ſides, which ſeems to me unneceſſary to be taken into conſideration upon the preſent queſtion; the deciſion of which depends upon a very ſhort point.

The argument begins as early as the time of *Ed.* 4. with mooting about the perſonal incapacity of the members of this corporation. The anſwer to all that is, it is not the act of the *perſons*, but of the *body corporate*; therefore the act is good.

Another ground of argument that has been made is, the incapacity of infants to become grantees of offices; and that there are many things intermixed with the adminiſtration of juſtice which an infant is of capacity to take by grant. But that is not the queſtion.

The next head of argument is, Whether this office of burgeſs is not an office touching the adminiſtration of juſtice. It would be a pretty nice point if it could be brought to that. But the caſe does not depend upon that queſtion. Let us ſee then what the true queſtion is. This is a corporation which derives its conſtitution under a charter from the king, and their whole power ariſes from it. It follows therefore that they are bound to act according to the powers and directions which it contains.

The queſtion then is, Whether the defendant in this caſe being elected at the age of *five* years old, and ſworn in at *twenty-one*, is

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Mr. *Davenport* has ſaid there may be *inchoate* rights, to be completed when the parties are of age; and caſes have been alluded to of children born with a right to be admitted at 21, on payment of a ſum of money, and alſo titles by ſervitude or marriage. Clearly there may be ſuch *inchoate* rights; but, the queſtion is, Whether the king has by this charter given the corporation a power to grant *inchoate* rights to infants, to be put in execution upon their attaining the age of 21? If he has not, there is an end of the defendant's title. Let us ſee then what the terms of the charter are.

The king enables the mayor and aldermen, or the greater part of them, to chuſe as many burgeſſes as they ſhall think proper, and to adminiſter to them the oath of office, and *till ſworn* they are not *complete* burgeſſes. Upon an information they muſt be ſworn in. Did the king mean, when he directed they ſhould be ſworn in, that they ſhould ſwear in ſucking infants? It is ſaid a corporation may chuſe abſent members: if fairly, and conſiſtent with the charter, they may. But they cannot chuſe an abſent member colluſively: and in the caſe of *Cambridge*, the court was of opinion that it was a fraudulent election. There is no more in this caſe than this, that the king has given them a power to chuſe and ſwear in burgeſſes; and the queſtion is, Whether he gave them a power to grant an *inchoate* right, when no oath could be adminiſtered to them. I am clearly of opinion that no ſuch power is given by the charter.

Aſton Juſtice. The queſtion does not depend upon the capacity or incapacity of infants to take; but whether this corporation are empowered by their charter to grant *inchoate* rights to infants.—As to the caſe in the year book, 21 *Ed.* 4. 12. the ground upon which the court held the plea to be good was, that the bond was the act of the corporation, not the act of the mayor; and that the dureſs under which *he* acted, was the dureſs of the *whole body*: conſequently the bond was void.

In moſt charters the direction as to the election of burgeſſes is, that the mayor, &c. ſhall chuſe one or more of the *diſcreet* men of the borough, to be a burgeſs or burgeſſes. But can it be ſaid, that an infant of *five* years of age, is or can be ſuppoſed to be ſuch *diſcreet* perſon? The words of the preſent charter are, that "they may, as often as it ſhall appear to them

"to

" to be *fit* and *neceſſary*, elect ſo many and *ſuch* perſons to be " burgeſſes as they ſhould pleaſe, and to ſuch perſons ſo choſen, " ſhall *adminiſter an oath* faithfully to execute the office." This ſuppoſes the mayor and aldermen, *&c.* to exerciſe their judgment in electing perſons to be burgeſſes; and in reſpect of the oath, the ELECTION and SWEARING are clearly intended to be *ſimul et ſemel*. But what is the preſent caſe? Not an *election*, but a contingent *nomination*, which perhaps might never have taken effect; becauſe the party might not have lived. Other perſons might, at ſuch a diſtance as 16 years, be to ſwear him in; diſputes might ariſe as to his being the ſame perſon, beſides involving many other inconveniencies. I am clearly therefore of opinion, upon the true conſtruction of this charter, that the act muſt be the act of the corporation for the time being, to be executed preſently by them; and that it was not intended they ſhould have a power to nominate for many years to come; ſuch nomination to be completed, if the party ſhould at ſuch future time happen to be in *eſſe*, and diſpoſed to take the office upon him.

1774.

REX *verſus* CARTER.

Wilkes Juſtice. I am clearly of the ſame opinion; there never was a plainer caſe.

Aſhhurſt Juſtice. I think this a very clear caſe. The power which the charter gives of electing burgeſſes in this borough, is to be exerciſed when and as often as it ſhall appear to the mayor, aldermen, *&c.* to be *fit* and *neceſſary*. By that is meant, fit and neceſſary for the preſent purpoſes of the corporation; and the perſons intended, ſuch as are capable of taking upon themſelves the immediate execution of the office: not perſons to be nominated only, and who might or might not act, or be capable of acting in future, as circumſtances and events might turn out.

Judgment for the king.

JONES *verſus* COOPER.

Friday, Nov. 25th.

THIS was an action for goods ſold and delivered at the inſtance of the defendant. Plea, *non aſſumpſit*, and verdict for the *defendant*. Upon a rule to ſhew cauſe why a new trial ſhould not be granted, the caſe appeared from the report of Mr. Juſtice *Nares*, who tried the cauſe, to be ſhortly this: The

A parol promiſe to pay for goods ſold to B, if B. did not pay for them, though made before *delivery* of the goods, is a *collateral* undertaking within the ſtatute of frauds.

1774.

JONES versus COOPER.

defendant had frequently given written orders to the plaintiff to deliver goods of different kinds to one *Smith*, her ſon-in law; in all of which ſhe undertook to be anſwerable for the payment. Theſe had been all punctually diſcharged. But the goods upon which the preſent queſtion aroſe were delivered to *Smith*, in conſequence of a *parol* order and a *parol* promiſe by the defendant in theſe words, "*I will pay you, if Smith will not.*"—That the undertaking was before the delivery of the goods; but that *Smith* was entered as the debtor in the plaintiff's books.

Mr. *Manſfield* and Mr. *Buller*, in ſupport of the rule. The ſingle queſtion is, Whether the promiſe which is the ground of the plaintiff's action, is to be conſidered as a collateral promiſe within the ſtatute of frauds; or whether it is not an original undertaking upon the credit of which the goods were ſupplied to *Smith*?

The words of the *ſtat.* 29 *Car.* 2. *c.* 3. are, "That no "action ſhall be brought whereby to charge a perſon upon any "ſpecial promiſe to anſwer for the debt or default of another, "unleſs the agreement upon which ſuch action is brought, "ſhall be in writing." This is not an undertaking for the debt of another; but an original contract upon the confidence of which the debt firſt accrued: Therefore not within the ſtatute; and ſo it was held in *Mawbrey* verſus *Cunningham*, Sittings after *Hil. Term* 1773. There goods were delivered to *A*, at the requeſt of *B*, who ſaid *he would ſee them paid for.* Lord *Manſfield* held, that as the promiſe was before delivery of the goods, it was not within the ſtatute, becauſe at the time of the promiſe there was no debt at all.

Mr. *Dunning contra.* The caſe cited, was for goods ſold at the defendant's requeſt, and a promiſe by the defendant to pay for them. No doubt if goods be delivered to *A*, upon the requeſt of *B.*, and *B.* promiſes to pay for them, they are goods ſold to *B.* But in the preſent caſe, the defendant was to pay only *in caſe Smith* (to whom the goods were ſent) did not pay for them; it is therefore a conditional promiſe. *Smith* was made debtor for them; and conſidered as ſuch by the plaintiff, and therefore he ſhould have uſed due diligence to recover againſt *Smith*, before he had recourſe to the defendant.

Lord *Manſfield.* The general diſtinction is a clear one, and upon that diſtinction the caſe which has been cited was determined. Where the undertaking is *before delivery*, and there is a direction

a direction to deliver the goods, and I will see them paid for, it is not within the statute of frauds. But there may be a nicety where the undertaking is before delivery, and yet *conditional* as this is. It turns singly upon the undertaking being *in case* the *other* did *not* pay.—We will look into it. 1774. JONES *versus* COOPER.

The next day Lord *Mansfield* delivered the unanimous opinion of the court as follows:

We are all of opinion upon the authority of the cases in the books, that the promise by the defendant in this case, to pay, if *Smith* did not, is a collateral undertaking within the statute of frauds; and it is so clear that it would only be mispending time to go through the cases, or to say much about it.

Rule for a new trial discharged.

REX *versus* BEACH.

Indictment for perjury. Variance in the word underwood for under-*stood*, held not material.

THE defendant in this case had been convicted of perjury in an affidavit. Upon shewing cause why the judgment should not be arrested, exception was taken by Mr. *Dunning* and Mr. *Buller*, in support of the rule, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant swore, that "he understood and "believed, *&c.*" whereas the assignment of the perjury in the indictment was, "that he had falsely sworn, that he under*s*tood "and believed, *&c.*" omitting the letter *s*.

In support of this exception it was insisted, that this being a variance in the material part of the charge, namely, in the assignment of the perjury itself, was fatal, and could not be cured by verdict; and cited *Queen* versus *Drake*, 2 *Salk.* 660.—*Hutton* 56. *Cro. Jac.* 133. 5 *Rep.* 45. 2 Lord *Raym.* 1224.

Cur. advisare vult.

Lord *Mansfield* now delivered the unanimous opinion of the court as follows. This was a motion in arrest of judgment on an indictment for perjury in an affidavit; upon the ground of a material variance between the affidavit and the indictment, the letter *s* being left out in the word understood: and it comes before the court after the jury have read it "under*s*tood." We have looked into all the cases upon the subject; some of which go to a great degree of nicety indeed; particularly the case in *Hutton* 56. where the word *indicari* was written for *indictari*; whereas it should have been written with an abbreviation *indicari*: but that case is shaken by the doctrine laid down in 2 *Hawk.* 239.

1774.

REX *verſus* BEACH.

The true diſtinction ſeems to be taken in the caſe of the *Queen* verſus *Drake*, 2 *Salk.* 660. which is this; that *where the omiſſion or addition of a letter does not change the word, ſo as to make it another word, the variance is not material.* To be ſure, a greater ſtrictneſs is required in criminal proſecutions than in civil caſes; and in the former a defendant is allowed to take advantage of nicer exceptions. But this is a caſe where the matter has been fairly tried, and where the omiſſion of the letter *s* certainly does not change the word. Therefore we are all of opinion, that the jury were very right in reading it "underſtood."

Rule for arreſting the judgment, diſcharged.

Same day.

GILBERT *verſus* BURTENSHAW.

In perſonal *torts*, the court will ſeldom grant a new trial for exceſſive damages.

THIS was an action for maliciouſly indicting the plaintiff for perjury.—The ſecond and third count were for defamation, in ſaying the plaintiff was a perjured knave and ſcoundrel, after acquittal, and he would prove it.

Upon ſhewing cauſe why a new trial ſhould not be granted on the ground of exceſſive damages, it appeared by the report of Lord Chief Baron *Smythe*, before whom the cauſe was tried, that his Lordſhip directed the jury, in caſe they were of opinion that there was malice, and no probable cauſe, to find a verdict for the plaintiff; but if they thought there was a probable cauſe, then to find a verdict for the defendant. The jury found a verdict for the plaintiff, damages 400*l.* and his Lordſhip reported that he was very well ſatisfied with the verdict.

Mr. *Dunning*, Mr. *Lade*, and Mr. *Morgan*, in ſupport of the rule, were inſtructed to ſay, that the acquittal upon the indictment for perjury was by miſtake, and not upon the merits: and in reſpect of the damages they inſiſted, that as no ſpecial damage was laid or proved, the ſum of 400*l.* was much too ſevere and exceſſive.

Mr. Juſtice *Willes*, who tried the indictment againſt *Gilbert* the plaintiff, explained what paſſed at that time, and ſaid, that after a trial of ſix hours it was an acquittal upon the merits, and very much to his ſatisfaction.

Lord *Manſfield*. This rule comes before the court ſingly on the judge's report.—It is not an application on the ground of ſurpriſe or of new evidence, that has been diſcovered ſince the trial; nor upon the ground, which counſel were inſtructed to mention

1774.

GILBERT *verſus* BURTENSHAW.

mention to the court when it was firſt moved, namely, that from the hurry of ſumming up, the jury were miſled to think, that declarations accuſing the plaintiff of perjury were left to the jury, when in fact no ſuch evidence was given. By the report it appears that that ſuggeſtion is totally untrue; and that there was ſtrong evidence of ſuch declarations being made by *Burtenſhaw*, after the trial of the indictment.

The verdict is taken upon two counts: upon the firſt, "for "maliciouſly indicting the plaintiff of perjury;" and upon the ſecond, for calling him "a perjured raſcal, and ſaying he would "prove it." There was evidence in ſupport of both counts. Therefore the whole ground of the application reſts on the point of exceſſive damages. I ſhould be ſorry to ſay, that in caſes of perſonal torts, no new trial ſhould ever be granted for damages, which manifeſtly ſhew the jury to have been actuated by paſſion, partiality, or prejudice. But it is not to be done without very ſtrong grounds indeed; and ſuch as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the court may feel, that if they had been on the jury they would have given leſs damages, or where they might think the jury themſelves would have completely diſcharged their duty, in giving a leſs ſum. Of all the caſes left to a jury, none is more emphatically left to their ſound diſcretion than ſuch a caſe as this: and unleſs it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw the line. But in this caſe, where the defendant has been guilty of repeated defamation againſt the plaintiff, after a fair trial and acquittal upon a malicious proſecution, it is impoſſible for the court to go into a nice examination and admeaſurement of what ought to have been the damages.

ASTON, Juſtice.—I am clearly of the ſame opinion; and in the preſent caſe I ſhould doubt, even if it ſtood upon the ſecond count only, whether the court ought to interpoſe on account of the largeneſs of the damages, in favour of a man who has been guilty of charging another with ſo foul a crime as is there laid, and declaring in public that he would prove it upon him.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion

Rule for a new trial diſcharged.

1774.

Saturday, Nov. 26.

MACE *verſus* CADELL.

TROVER for goods. Upon ſhewing cauſe why the verdict given in this caſe for the plaintiff ſhould not be ſet aſide, and a non-ſuit entered; the court took time to conſider. And now Lord *Mansfield* delivered the unanimous opinion of the court as follows:

The enacting part of *ſect.* 11. *ſtat.* 21. *Jac.* 1. *c.* 19. is not reſtrained by the preamble, but extends to goods of a *third perſon*, which he permits a trader, who afterwards becomes bankrupt, to be in the *poſſeſſion of*, and *to ſell as his own*; as well as to the bankrupt's *original property*, ſo kept and diſpoſed of by him as his own, *after* having *conveyed* it to a third perſon.

The plaintiff, *Mace*, kept a public houſe, had a licence, and ſaid ſhe was married to one *Penrice*. She went to the *Exciſe-Office*, had his name entered in the books, with a note in the margin "*married.*" *Penrice* had the licence, and continued in poſſeſſion of the houſe and goods, from that time till he abſconded, and went to *Pimlico*, which was an act of bankruptcy. *Mace*, the plaintiff, firſt claimed the goods in queſtion, under a bill of ſale from *Penrice*; but afterwards as her own original property, and denied that *Penrice* and ſhe were married. *Penrice* was examined, and he ſaid that it was not till within three weeks before he went away that he knew whether he would marry her or not.

At the trial a doubt occurred to me, whether this caſe did not come within the *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 11. For the poſſeſſion which the bankrupt had of theſe goods, was emphatically a poſſeſſion of them *as his own*, and kept by him as ſuch. It was ſuggeſted, that there was a ſimilar caſe depending in the *C. B.* where the queſtion was, Whether the enacting clauſe of the eleventh ſection extends further than the preamble of that ſection, ſo as to *include goods not originally* the bankrupt's The preamble only ſays, "And for that it often falls out that many "perſons before they become bankrupts, do *convey their goods* "to other men, upon good conſideration, yet ſtill do keep the "ſame, and are reputed owners thereof, and diſpoſe of the ſame "as their own:" But the words of the enacting part are as follows: "Be it enacted, that if any perſon, at ſuch time as he "ſhall become bankrupt, ſhall, *by the conſent of the true owner*, "*&c.* have in his poſſeſſion, *&c.* any goods, *&c.* whereof he "ſhall be reputed owner, the commiſſioners ſhall have power "to ſell the ſame in like manner as any other part of the bank-"rupt's eſtate." Theſe words clearly extend to other perſons goods, as well as to thoſe which were originally the bankrupt's property. For the ſake of conformity, we were deſirous to

ſtay till the court of *Common Pleas* had given their opinion. But that caſe we underſtand is made up. 1774.

MACE *verſus* CADELL.

We have conſidered the general queſtion; and to be ſure there is a variety of mooting in the books without any determination.

But if the ſtatute meant to comprehend nothing more than is contained in the preamble, it means nothing at all. Becauſe even *before* the ſtatute, if a man had *conveyed* his *own* goods to a third perſon, and had kept the poſſeſſion, ſuch poſſeſſion would have been void, as being fraudulent according to the doctrine in *Twine*'s caſe, 3 *Rep.* 81. At the ſame time, the ſtatute does not extend to all poſſible caſes, where one man has another man's goods in his poſſeſſion. It does not extend to the caſe of factors or goldſmiths, who have the poſſeſſion of other men's goods merely as truſtees, or under a bare authority, to ſell for the uſe of their principal; but the goods muſt be ſuch as the party ſuffers the trader to ſell *as his own*. Therefore, upon this ground we are all of opinion, that the verdict ought to be ſet aſide.

But, in the conſideration of this general queſtion another point appeared, upon which we are equally clear; namely, that after a ſolemn declaration by the plaintiff that ſhe was married to *Penrice*, and that theſe were the goods of *Penrice* in her right, ſhe ſhall never be allowed to ſay, that ſhe was not married to him, and that the goods were her ſole property. On either ground, therefore, the verdict is wrong. If ſuch a practice were to be allowed it would be laying a trap for perſons to deal with bankrupts.

Per Cur. Let the verdict be ſet aſide, and a non-ſuit entered.

THE END OF MICHAELMAS TERM.

HILARY TERM.

15 GEORGE III. *B. R.* 1775.

Saturday, Jan. 27th.

MORGAN et UXOR *verſus* JOHN GRIFFITHS, and Others.

Deviſe to T. G. *for and during his natural life*, and after his deceaſe to *his heirs* and aſſigns for ever, *for want of ſuch heirs*, to T. E. his heirs and aſſigns for ever. T. G. has only an eſtate tail.

THIS was a caſe out of *Chancery* in ſubſtance as follows:

Thomas Griffiths being ſeiſed in fee of the premiſes in queſtion, by his laſt will amongſt other things gave and deviſed as follows:

"I do give, bequeath, and deviſe two parts to be divided in "three parts, of all that tenement and lands ſituate, lying, and "being within the pariſh of *Abergivilly*, and county of *Car-*"*marthen*, commonly called and known by the name of *Bwlch* "*Gwynn*, unto *Thomas Griffiths*, my grandchild, *for and during* "*his natural life*, and after his deceaſe, to his right and lawful "*heirs* and aſſigns, for ever; and *for want of ſuch lawful* "*heirs*, I do give the ſaid lands, as before expreſſed, to *Thomas* "*Evan*, ſon of *Evan Thomas*, of *Penllwyn*, the lands to his "heirs and aſſigns for ever."

The teſtator died ſoon after, without revoking or altering his ſaid will; whereupon the ſaid *Thomas Griffiths*, his grandſon, entered into poſſeſſion of the premiſes, and being ſeiſed as aforeſaid, by leaſe and releaſe of the 30th and 31ſt *January*, 1727, previous to his marriage with *Dorothy* his firſt wife, conveyed the ſame to the uſe of himſelf for life, remainder to his wife for life, remainder to the *heirs of his body* on the ſaid *Dorothy* to be begotten, remainder to his own right heirs.

Dorothy

1775.

MORGAN *verſus* GRIFFITHS.

Dorothy died, leaving *Rachael* (the wife of the plaintiff) her only child, by her ſaid huſband, who afterwards married a ſecond wife, by whom he had iſſue the defendant *John Griffiths*, and ſeveral other children, and died.

Upon his death, the defendant *John* entered on the premiſes, claiming them as tenant in tail, under the will of his great-grandfather, *Thomas Griffiths*, the teſtator.

The plaintiff and his wife claimed under the ſettlement of *Thomas Griffiths*, her father, conceiving that he took an eſtate in fee, under the will of the teſtator, *Thomas Griffiths*, his grandfather.

Thomas Evan, the deviſee in remainder in the ſaid will, was another grandſon of the teſtator, and ſurvived him.

The queſtion ſubmitted by the Lords Commiſſioners, for the opinion of this court was, what eſtate the grandſon *Thomas Griffiths*, took in the premiſes by the will of the ſaid *Thomas Griffiths*, the grandfather?

Mr. *Wallace*, who was for the plaintiff, acknowledged the rule of law to be clearly ſettled; that where one deviſes to *A.* and his heirs generally, which would convey a fee, yet if there be a remainder over, for want or upon failure of ſuch heirs, to a perſon who might take the eſtate as heir, the word heirs is reſtrained to heirs of the body, and *A.* has only an eſtate tail by ſuch deviſe; conſequently in the preſent caſe the defendant was clearly entitled.

Lord MANSFIELD.—There can be no queſtion about it, and accordingly the court certified as follows:

Having heard counſel on both ſides, and conſidered the above caſe, we are of opinion that the grandſon *Thomas Griffiths* took an eſtate tail in the tenement, called *Bwlch Gwynn*, by the will of the ſaid *Thomas Griffiths*, the grandfather.

ROE ex dim. BOWES *verſus* BLACKETT.

Tueſday, Jan. 31ſt.

To make a deviſe of lands without any limitation a fee, ſuch a manifeſt intention muſt appear that the teſtator meant to give a fee, as may ſatisfy the conſcience of the court, in pronouncing it ſuch. If it is barely problematical, the rule of law muſt take place.

IN ejectment for certain lands ſituate in the townſhip of *Newnham*, in the County of *Northumberland*, the jury found a ſpecial verdict, ſtating in ſubſtance as follows: that *Chriſtopher Blackett* was ſeiſed of the tenements, with the appurtenances, in the declaration mentioned, in his demeſne, as of fee;

1775.

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versus
BLACK-
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fee; and was likewiſe poſſeſſed of ſeveral lands and tenements held by him under leaſes for years, lying contiguous to the ſaid freehold tenements; and which ſaid leaſehold lands and tenements were deviſed along with the ſaid freehold tenements without diſtinction, to the ſeveral occupiers thereof, who enjoyed the ſaid leaſehold and freehold tenements, *without knowing or inquiring which were leaſehold and which were freehold*: and being ſo ſeiſed on the 24th day of *Auguſt*, 1738, he made his laſt will and teſtament in writing, duly executed and atteſted to paſs real eſtates, and thereby deviſed as follows: "I give, "bequeath, and deviſe to my dearly beloved wife, *Elizabeth* "*Blackett*, all my freehold and leaſehold meſſuages, houſes, "lands, and tenements, ſituate at *Newnham*, in the county of "*Northumberland*, and elſewhere, and all my eſtate and inter- "eſt therein, *for and during her natural life*; and I do hereby "conſtitute and appoint *John Foſter*, of *Eddeſton*, in the ſaid "county of *Northumberland*, Eſquire, truſtee for my ſaid wife "during her natural life aforeſaid; and from and after her de- "ceaſe, I give, deviſe, and bequeath, the ſaid meſſuages, houſes, "land, and tenements, to my ſiſters in law Mrs. *Elizabeth* "*Smart*, and Mrs. *Martha Maria Bellaſyſe*, of *Haughton upon* "*Skien*, in the county of *Durham*, as *tenants in common: But* "*in caſe my mother Mrs. Alice Bellaſyſe, ſhall give or cauſe to be* "*given, any diſturbance or moleſtation to my ſaid wife, about the* "*poſſeſſion and enjoyment of my ſaid meſſuages, houſes, lands, and* "*tenements, then my mind and will is, that the ſame ſhall go to* "*my kinſman William Blackett, of the town and county of New-* "*caſtle upon Tyne, his heirs and aſſigns for ever: and I give and* "*bequeath the ſaid meſſuages, houſes, lands, and tenements, to* "*him accordingly, and do make him my* SOLE *heir thereof.* And "my mind and will further is, and I do hereby *charge* and "make chargeable my ſaid eſtate, with the *payment* of all my "juſt *debts* and funeral expences, and order the ſame to be "paid out of the *yearly profits* of my ſaid eſtate, *by my* ſaid *wife*. "And I do further give and deviſe all my perſonal eſtate what- "ſoever, to my dearly beloved wife aforeſaid, and do hereby "make her *ſole executrix* of this my laſt will and teſtament."

That the teſtator died on the 27th *Auguſt*, 1738, without iſſue, leaving *John Blackett*, ſince deceaſed, father of the defendant *John Blackett*, his heir at law. *Elizabeth Blackett*, the teſtator's widow, immediately after his death entered on the premiſes. That *Martha Maria Bellaſyſe* intermarried with *Richard*

Richard Bowes, who purchaſed the reverſion of the one undivided moiety of the premiſes of *Elizabeth Smart*; and being ſo ſeiſed died inteſtate, leaving *Thomas Bowes* the leſſor of the plaintiff, his heir at law. That afterwards, on the 13th *July*, 1767, *Martha Maria Bowes*, widow of the ſaid *Richard Bowes*, died ſeiſed of the reverſion of the aforeſaid moiety of the premiſes, upon whoſe death the ſame deſcended to the ſaid *Thomas Bowes*, the leſſor of the plaintiff. That at the time of the teſtator's death, the ſaid teſtator was of the age of 27, the ſaid *Elizabeth Blackett*, his widow, of the age of 34, *Elizabeth Smart* of the age of 22, and *Martha Maria Bellaſyſe* 18. That the defendant was heir at law of the teſtator. The queſtion was, whether the half-ſiſters took an eſtate for *life* or in *fee*?

This caſe was argued twice; firſt in *Michaelmas* term by Mr. *Chambre*, for the plaintiff, and Mr. *Davenport*, for the defendant; and again in this term by Mr. *Wilſon*, for the plaintiff, and Mr. *Dunning*, for the defendant. For the plaintiff it was argued that the half-ſiſters took a *fee*. 1ſt, The fact found by the ſpecial verdict of the freehold and leaſehold lands, being ſo intermixed as to be undiſtinguiſhable by the tenants, and being coupled by the teſtator in the ſame deviſe, clearly ſhews his *intention* was to diſpoſe of *all* his eſtate. His two half-ſiſters were nearer of kin to him than his heir at law; his diſpoſition, therefore, to them was but reaſonable, and if his intention to do ſo is apparent, the court will carry it into execution, though there are no technical words. The circumſtances that ſhew he meant his ſiſters ſhould take a fee are, that having firſt charged this eſtate with the payment of his debts, he makes this material diſtinction between the two bequeſts; he directs his *wife* to pay only out of the *rents* and *profits*, but leaves it a *groſs charge* in the deviſe to his *ſiſters*. Now it is an eſtabliſhed rule of law, that where a groſs ſum is charged, though there are no words of limitation, the deviſee ſhall take a fee, for otherwiſe he might reap no benefit from it; but where it is payable out of rents and profits it is only an eſtate for life; 2dly, Where a man uſes no words of limitation, it is reaſonable to preſume that he meant more than an eſtate for life; eſpecially where in the immediate precedent deviſe, meaning to give his wife an eſtate for *life only*, he expreſsly ſays, "*for and during her natural* "*life.*" But further, the fee of the *leaſehold* clearly paſſes without any limitation at all; and therefore the freehold muſt paſs too, or the manifeſt intention of the teſtator to unite the whole would

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would be fruſtrated.—Again, the words, "*All my eſtate and in-*"*tereſt therein*," are material; for no doubt, the teſtator had ſome meaning in making uſe of them; but if applied to the life eſtate to his wife, they are nugatory; they are equally ſo in reſpect of the deviſe to *William Blackett*, becauſe of the additional words "*his heirs for ever*:" Therefore the only way of giving ſenſe to this expreſſion, is by tranſpoſing them, or conſidering them as repeated, in the deviſe to his ſiſters. Laſtly, it is plain that he did not intend his heirs ſhould take in any event, for in caſe of diſturbance by the mother, he gives the eſtate over to *William Blackett*. The natural inference from this is, that he hoped to prevent any diſturbance from the mother by making the daughters ſuffer in conſequence of it. But if the deviſe to them is conſtrued an eſtate for life, it would be puniſhing his heir, which certainly could never be his intention in inſerting that clauſe, if he had meant his heir ſhould receive any benefit.

For the defendants *contra*. An heir at law ſhall not be diſinherited without expreſs words, or a clear and manifeſt intent apparent upon the face of the will. A *conjectural* intention is not ſufficient, nor an intention which the court may ſuppoſe the teſtator ought to have had, if it is not ſupported by a neceſſary implication. Therefore there muſt either be words of limitation or ſomething in the will tantamount; but thoſe *tantamount* words muſt be *clear*. In this caſe there are no words of limitation, nor is there any thing to ſupply them, ſo as to ſatisfy the court even of a probable intention to give more to the half-ſiſters than an eſtate for life. But conjecture and probability are not ſufficient.

Afterwards, on *Friday* the 3d of *February* in this term, Lord *Mansfield*, after ſtating the caſe, delivered the opinion of the court as follows.

The queſtion ariſing out of theſe facts ſtated in the ſpecial verdict, and which is reſerved for the opinion of the court, is, "Whether the eſtate given to the ſiſters in law, as tenants in "common, is an eſtate for life or in fee."

There are no words of limitation added to this deviſe; and therefore it is clear by the rule of law, that it is only an eſtate for life, unleſs it can be found from the whole of the will taken together and applied to the ſubject matter of this deviſe, that the teſtator's intention was to give a fee. Indeed, if from the whole of the will ſo taken together and applied to the ſubject matter it can be collected that the teſtator meant to give a fee,

it has been very properly, and very truly admitted at the bar, that it ought to be ſo conſtrued in order to give effect to ſuch intention. 1775.

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Several arguments have been uſed to ſhew that ſuch intention may be collected in this caſe. In the firſt place, ſtreſs is laid on the circumſtance of its being found by the ſpecial verdict, that the teſtator's lands were partly freehold and partly leaſehold; that they lay contiguous to and intermixed with each other, ſo much ſo, that even the tenants did not know how to diſtinguiſh them: and yet that the teſtator has included both indiſcriminately in the deviſe in queſtion. From thence it is argued, and I think fairly, that the teſtator meant his freehold and leaſehold property ſhould go together. But if that be ſo, it is inſiſted further, that this deviſe, though without words of limitation, will carry the *fee ſimple of both*. For it would clearly paſs the fee of the *chattels* if they ſtood *alone*; and, therefore, conſiſtent with the intention of the teſtator to unite the whole of his property and make it *one* eſtate, it muſt be conſtrued to paſs the *freehold* too. But that argument turns in a circle; for it may as fairly be argued, that the deviſe of the freehold, which without words of limitation is by law an eſtate for life only, ſhould carry the leaſehold after it.

The ſecond argument is, that "he has charged this eſtate with "the payment of his debts;" and that where an eſtate is given to *J. S.* on condition of his paying a groſs ſum of money, it is a fair inference from the burthen impoſed upon him, that the teſtator intended him in all events a benefit; which can only be certain from his taking a fee. But that argument does not hold in the preſent caſe; for though the eſtate is charged with the payment of debts; yet here they are ordered to be paid out of the rents and profits, by his wife, who was a young woman of 34. No certain inference, therefore, can be drawn from thence.

The third argument is drawn from the words which follow the deſcription of the meſſuages preceding the deviſe to the wife for life; namely, "all my eſtate and intereſt therein," and from thence it has been inſiſted, that no words of limitation were neceſſary. But theſe words added precedent to an eſtate for life, can have no meaning at all; and it is remarkable that they are left out in the deviſe to his half-ſiſters, which ſhews the teſtator meant nothing by uſing the expreſſion in the deviſe to his wife.

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These are the several observations that have been made; from whence it has been argued, that the testator's intention was to give his half-sisters a fee. But I am not able to find in this will, any circumstances sufficiently certain to satisfy my mind that the testator really meant a fee. As to the clause of disturbance by the mother, and the devise to *William Blackett* thereupon, I am very doubtful upon conjecture, whether the testator's idea was barely to give *William Blackett* his estate, in case of an effectual disturbance, and to give him a fee upon that contingency only. For in that case it must have happened during the wife's life; it must have happened, therefore, before the estate could have gone to the half-sisters. The words are however very incorrect and inaccurate; and it is strange that barely on that contingency, depending upon the act of the mother, he should make a fee depend. I rather think his own intention might be this—To make his kinsman, *William Blackett*, his heir in reversion, after his half-sisters; but in case of disturbance, that then he should take it immediately in possession, and not in reversion, which seems to be the reason of his saying "I make "him my *sole* heir thereof." But I am not satisfied in my own mind, that even that is the right construction, and, therefore, say it merely upon conjecture. It is however enough for our judgment that the construction is doubtful; for, in order to make a devise of lands *without any limitation* added, a fee, such an intention must appear as is sufficient to satisfy the conscience of the court in pronouncing it such: if it is barely problematical, the rule of law must take place. No inference in this case is to be drawn, the one way or the other, from the circumstance of the testator's knowing how to give, for that does not appear.

Therefore, it being very doubtful whether the testator did mean a fee, or not, our determination must go by the rule of law, namely; that there being no words of limitation, the half-sisters take an estate for life only, and consequently there must be judgment for the defendant.

Judgment for the defendant.

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REX *verſus* KEMPSON.

Wedneſday, Feb. 1ſt.

THE defendant had been convicted in ſeveral penalties upon the *game laws*. In the conviction the appearance of the defendant and the evidence were ſet forth as follows;

In a conviction it is ſufficient if enough appears, to ſhew that the evidence was given in the preſence of the defendant; without ſtating that he was actually preſent at the time.

Afterwards upon the aforeſaid day, and in the year aforeſaid, he, the ſaid *Samuel Kempſon*, having been duly ſummoned, appeareth, and is there *preſent* before me in order *to make his defence* againſt the ſaid charge and information, and having *heard* the ſame is aſked by me the ſaid juſtice, if he can ſay any thing for himſelf, why, *&c.* Who pleadeth that he is *not guilty* of the ſaid offence; nevertheleſs, on the ſaid 14th day of *September*, one credible witneſs, *Richard Cratorn*, now cometh before me, the ſaid juſtice, *&c.* and upon his oath depoſeth and ſaith, that on *Wedneſday* the 14th day of this inſtant *September*, he *ſaw Samuel Kempſon*, *&c. &c.* and thereupon the ſaid *Samuel Kempſon*, before me the ſaid juſtice, by the oath of one credible witneſs aforeſaid, according to the form of the ſaid ſtatute aforeſaid, in ſuch caſe made and provided is convicted of the ſaid offence, *&c.*

Upon the record being removed by *certiorari*, Mr. *Chambre* objected, that it did not appear upon the face of this conviction, that the *evidence* was given *in the preſence of the defendant*, which it ought to be, that the party accuſed may have an opportunity of croſs-examination.

Mr. *Poole*, *contra*, inſiſted that it was not neceſſary to ſtate that the evidence was given in the preſence of the party accuſed. It is ſufficient if it appears from what is ſtated that he was preſent at the time. Now here it is ſtated that the defendant appeared, pleaded not guilty, and then the evidence was gone into; in ſuch a caſe the court will preſume that he was preſent at the time, and cited *Rex* verſus *Aiken*, 3 *Burr.* 1785, as in point.

Aſton Juſtice. Enough appears upon this conviction, to ſhew that the witneſs was examined in the preſence of the defendant. It muſt be ſuppoſed that all that paſſed was at one and the ſame time.

Per Cur. Let the conviction be affirmed.

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Friday, Feb. 3d.

HUNT *verſus* COPE.

In replevin upon a diſtreſs for rent, plea in bar, that the defendant *pulled down a ſummer-houſe*, whereby the plaintiff *was deprived of the uſe* thereof, without ſaying that he was *expelled* or put out of the ſame, is inſufficient; being a mere *treſpaſs*, but *no eviction*.

ERROR from a judgment of the court of *King's Bench*, in *Ireland*, in an action of *replevin*, brought by the plaintiff, now defendant in error, for taking certain goods of the ſaid *Henry Cope*, out of his dwelling-houſe, and detaining them, *&c.*

The defendant, the now plaintiff in error, avowed the taking for rent arrear due by the ſaid *Cope* to the ſaid defendant, for certain premiſes in the avowry mentioned.

The plaintiff pleaded 1ſt, That there was not any rent due to the defendant out of the premiſes, at the time of the taking, *&c.* upon which iſſue was joined. 2dly, That long before the taking of the goods, to wit on the 1ſt of *April* 1770, the defendant with force and arms unjuſtly and unlawfully entered upon the garden part of the meſſuage or tenement in the plaintiff's poſſeſſion, and did then and there with like force and arms unjuſtly and unlawfully *break* and *pull down* the roof and ceiling of a *ſummer-houſe*, part of the ſaid premiſes, and tore up the benches therein, by means whereof the plaintiff had been *deprived of the uſe* of the ſummer-houſe, from the ſaid 1ſt of *April*, 1770, until the day of taking of the ſaid goods, *&c.*

To this plea the defendant demurred, and the plaintiff joined in demurrer.

The Court of *King's Bench* in *Ireland*, gave judgment upon the demurrer for the plaintiff, whereupon the defendant brought this writ of error to reverſe the judgment, and aſſigned the general errors, and the plaintiff joined in error.

Mr. *Dunning*, for the plaintiff in error, ſtated the queſtion to be, Whether the facts ſet forth in the plea amounted to an eviction of the defendant? If not, which he contended they did not in this caſe, they were no ſuſpenſion of the rent, but a mere treſpaſs, and cited *Sir Thomas Jones*, 148. *Roper* verſus *Lloyd*, as in point; where, in covenant for non-payment of rent, the leſſee pleaded, that the plaintiff had *taken away a pent-houſe*, fixed to the premiſes, and the court held it a treſpaſs only, and no ſuſpenſion.

Mr. *Norton*, *contrà*, inſiſted that the facts in the plea did amount to an eviction; for here an actual entry by the leſſor is ſtated, and alſo that he pulled down part of the ſummer-houſe and the benches, ſo as entirely to deprive the leſſee of the uſe

of

of it: and cited 1 *Rol. Abr.* 940. *tit. extinguiſhment*, letter *N. pl.* 1. *Cro. El.* 341. the reaſoning of which caſes he ſaid went to ſhew, that wherever there is a *tortious* entry by a leſſor, ſo as to deprive the leſſee of the enjoyment of the premiſes, it amounts to a ſuſpenſion of the rent. 1775. HUNT *verſus* COPE.

Lord *Mansfield*. The whole queſtion in this caſe turns upon the pleading; for the rule of law is clear, namely, that to occaſion a ſuſpenſion of the rent, there muſt be an eviction or expulſion of the leſſee. But here the plea ſtates merely a treſpaſs, and no eviction, therefore the plaintiff muſt recover.

Aſton Juſtice. I am clearly of the ſame opinion. The caſe in *Cro. El.* 341. never received a final determination; and even upon the mooting of it *Fenner* and *Clench* doubted. All the caſes in the books ſuppoſe the leſſee to be put out of poſſeſſion; therefore merely ſaying that he was deprived of the enjoyment of the premiſes is not ſufficient, but he muſt plead that he was evicted. 1 Lord *Raym.* 370. *Clayton* 34. *Hob.* 326. *Reynolds* verſus *Buckle*.

Lord *Mansfield*. The defendant certainly ſhould have pleaded *eviction*, and then the facts that are now ſtated might have been ſufficient for the jury to have found a verdict in his favour.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

Judgment reverſed.

DOE ex dim. CHENY *verſus* BATTEN.

Monday, Feb. 13th.

THIS was an ejectment brought by the plaintiff, againſt the defendant, to recover ſome warehouſes in *London*. The action was tried before Lord *Mansfield*, at the ſittings in laſt term, at *Guildhall*. At the trial the caſe appeared to be ſhortly thus:

The defendant was tenant at will to the leſſor of the plaintiff, who, to determine the tenancy, gave notice at *Lady-day* to the defendant to quit at *Michaelmas*. The defendant not quitting at *Michaelmas*, the plaintiff brought this ejectment, and laid the demiſe on the 30th of *September*: the defendant appeared, and pleaded. Sometime after the plea was put in, the leſſor of the plaintiff received of the defendant a quarter's rent, due at *Chriſtmas*. The defendant's counſel inſiſted that this ſubſequent acceptance of rent ſubſequently due, was a waiver of the notice,

The *mere acceptance of rent* by a landlord, for occupation *ſubſequent* to the time when the tenant ought to have quitted according to the *notice* given him for that purpoſe, is *not of itſelf* a *waiver* on the part of the landlord of ſuch *notice* but matter of *evidence* only to be left to the jury, under the circumſtances of the caſe.

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and *tantamount* to an agreement, that the defendant ſhould continue tenant. His Lordſhip ſaid, he took the practice to be ſo; though in his own opinion it was unreaſonable. But being ſettled, he directed the jury to find for the defendant, which they accordingly did. Afterwards in the ſame term Lord *Mansfield* ſaid, he had turned the matter in his mind, and likewiſe mentioned it to the judges, who doubted if the law was as he had directed. It was therefore proper the point ſhould be ſettled, for which purpoſe his lordſhip deſired Mr. *Dunning* would move for a new trial. He accordingly did, and now in this term the caſe was argued by Mr. *Mansfield* and Mr. *Bolton*, for the defendant; and by Mr. *Dunning* and Mr. *Davenport*, for the plaintiff; when the court gave judgment as follows:

Lord *Mansfield*. This caſe has been extremely well argued on both ſides. It was underſtood on all hands at the trial, that there had been a generally conceived notion and practice, that where a landlord receives rent for the occupation ſubſequent to the time when the tenant ought to have quitted according to his notice, it is an admiſſion by the landlord, that he was his tenant after that time, and conſequently a waiver of the notice. When this was mooted at the trial, I did not think there were any caſes againſt the practice, but looked upon it as eſtabliſhed; and therefore I directed the jury to find a verdict for the defendant. At the ſame time I was ſtrongly of opinion that the practice was unreaſonable and derogatory to juſtice. And now upon examination it does not appear that we are precluded by authority, or any eſtabliſhed practice, from judging agreeable to the reaſon of the caſe.

It being clearly proved that a quarter's rent accrued ſince the demiſe, the queſtion is, Whether ſufficient matter appeared in point of law, to prevent the leſſor of the plaintiff from recovering in this ejectment? If there did not, the direction I gave was wrong. Firſt, if the matter which appeared ought to have been left as a *fact*, for the conſideration of the jury, in that point of view, it was erroneous: And ſecondly, if it be clear that in law the leſſor of the plaintiff was not *barred*, it was ſtill more erroneous. An ejectment is a moſt beneficial remedy for the recovery of lands. It is a remedy by fiction of law; and therefore ſhould be applied to the purpoſes that will beſt anſwer the ends of juſtice. In ejectment the plaintiff in his declaration ſtates, that on ſuch a day he had title to the poſſeſſion of ſuch lands, and upon the trial he is bound to prove that ſuch title was

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in him at the time ſo ſpecified. The title of the plaintiff in this caſe accrued by giving ſix months notice to the defendant to quit; which it was in proof had been duly given: indeed there is no diſpute, but that at the time the demiſe is ſtated to have been made, the leſſor of the plaintiff had a right to the poſſeſſion; and ſo he had at the time of the plea pleaded. The ſingle queſtion is, Whether the landlord has, by any ſubſequent act or agreement, waived ſuch his right, and conſented that the tenant ſhould continue the poſſeſſion? If he has, no doubt but he will be bound by ſuch agreement. As to that, the fact in this caſe is, that the landlord has received rent *eo nomine* for a quarter of a year, which became due after the time of the demiſe in the declaration laid. This circumſtance, it is inſiſted, is in fact a declaration on his part, that he departs from the notice he had given; and is an acknowledgment that he ſtill conſiders the defendant as his tenant. But let us ſuppoſe the landlord had accepted this rent under terms, or made an expreſs declaration that he did not mean to waive the notice, and that, notwithſtanding his acceptance or receipt of the rent, he ſhould ſtill inſiſt upon the poſſeſſion. Or ſuppoſe any fraud or contrivance on the part of the tenant in paying it. Clearly under ſuch circumſtances the plaintiff ought not to be *barred* of his right to recover: But all theſe are facts which ought to be left to the conſideration of the jury.

The queſtion therefore is, *quo animo* the rent was received, and what the real intention of both parties was? If the truth of the caſe is, that both parties intended the tenancy ſhould continue, there is an end of the plaintiff's title: if not, the landlord is not *barred* of his remedy by ejectment: as where the leſſor of the plaintiff, after the time laid in the demiſe, agreed to accept the ſingle inſtead of the double rent, which by the *ſtatute* 4 *Geo.* 2. *c.* 28. he was entitled to. This very point was determined in a caſe of *Gilder* ex dim. *Gilder* or *Gildoe*, verſus at *Saliſbury* aſſizes, 1754, before the preſent Lord Chief Baron (then Mr. Baron) *Smythe*. There the ſingle rent had been received by the landlord ſubſequent to the time of the demiſe laid; and the objection now inſiſted on, was made: but Mr. Baron *Smythe* over-ruled it. A caſe was afterwards reſerved for the opinion of *B. R.* when the court held it to be no *bar*; and that it ought not to preclude the plaintiff from recovering in ejectment. Lord Chief Baron *Smythe* and Mr. Juſtice *Gould* both remember this caſe. I entirely agree with that opinion. The

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ſtatute gives double rent if the tenant continues in poſſeſſion after notice to quit. But ſtill it is to be received as rent. What then is the caſe where a landlord accepts the *ſingle* rent only. The taking *half*, when he is entitled to an action for the whole, is an act of lenity; but it does not import a conſent that the tenant ſhall continue in poſſeſſion, or a waiver by the landlord, of his remedy by ejectment.

There is another caſe which was tried at *Launceſton* aſſizes, when Mr. Juſtice *Gould* was at the bar. The objection taken in that caſe was, that the leſſor of the plaintiff in ejectment, had likewiſe brought an action for uſe and occupation of the very ſame premiſes, for rent which had accrued ſubſequent to the time of the demiſe. This action ſtood ready for trial at the ſame aſſizes. In arguing the objection which is now made, it was ſaid, that the action was an action founded on promiſes, and a ſuppoſed permiſſion by the plaintiff to the defendant to occupy; therefore an acknowledgment on the part of the plaintiff that he was his tenant; and conſequently a waiver of his notice. But the objection was over-ruled: and the plaintiff recovered, firſt in the ejectment, and afterwards in the action for uſe and occupation. It was holden, that one of the remedies was not a waiver of the other. Why? Becauſe they were brought for ſeveral demands, to both of which the plaintiff was entitled; conſequently, the one could be no waiver of the other; for after recovery of the poſſeſſion, the plaintiff was entitled to the profits for uſe and occupation, if he thought fit to ſue for them. Therefore in point of law the mere acceptance of rent is not in itſelf a bar.

But if there were a doubt whether the poſſeſſion was by fraud, or in conſequence of a new agreement, or whether the acceptance of the rent was mutually intended or underſtood as a waiver of the notice, that is a fact which ought to be left to the jury to determine. It was not left in this caſe; and therefore I think there ought to be a new trial.

Aſton Juſtice. There is no doubt but that at the time of the demiſe laid, the leſſor of the plaintiff had a clear right to the poſſeſſion.

The queſtion is, Whether he has done any ſubſequent act which amounts to a waiver of that right? The only act which appears is, the acceptance of a ſingle quarter's rent accrued ſince. I think that is only a waiver of his right to *double* rent under the *ſtat.* 4 *Geo.* 2. and does not neceſſarily imply a conſent that

that the tenancy ſhould continue. Where an ejectment has been brought on the *ſtat.* 4. *Geo.* 2. *c.* 28. *ſect.* 2. for the forfeiture of a leaſe, there being half a year's rent in arrear, and no ſufficient diſtreſs on the premiſes; there, acceptance of rent afterwards by the landlord, has, I believe, been held a *waiver* of the *forfeiture* of the *leaſe*; which may well be; for it is a *penalty*, and by accepting the rent, the party waives the *penalty*. But this caſe is very different. For here the acceptance of *ſingle* rent, is only a waiver of his right to *double*. Therefore, I am of opinion that a new trial ought to be granted. 1775 Doe *verſus* Batten

WILLES Juſtice. I am of the ſame opinion.

ASHHURST Juſtice. I believe there have been many nonſuits upon this objection. But hitherto the queſtion has not been much agitated: it being rather taken for granted that the practice was ſo: and, therefore, till now, the matter does not ſeem to have been ſufficiently examined or explained. Whether the acceptance of rent after the time laid in the demiſe, is or is not a waiver of the notice, depends upon the *intention* of the parties; which is a matter of *fact*, and, therefore, to be left to the jury. If the landlord accepts it only as a compenſation for the *double* rent, which the ſtatute ſays he ſhall have a right to, it is a waiver of that only: but it does not waive his right to the poſſeſſion of the premiſes, which is entirely a diſtinct and different thing. Therefore I concur in opinion, that the verdict in this caſe ought to be ſet aſide, and a new trial granted.

Per Cur. Let the rule for a new trial be made abſolute.

THE END OF HILARY TERM.

EASTER TERM

15 GEORGE III. B. R. 1775.

Thurſday, May 4th.

REX *verſus* VARLO, Mayor of Portſmouth.

UPON ſhewing cauſe why an information in nature of *quo warranto* ſhould not be granted againſt the defendant, to ſhew by what authority he claimed to exerciſe the office of mayor of the borough of *Portſmouth*, the conſtitution of the borough, as far as reſpected this queſtion, was admitted on both ſides to be as follows :—That the corporation was a corporation by preſcription, and alſo by charter of *Car.* 1. and conſiſted of a mayor, twelve aldermen, and an indefinite number of burgeſſes; and the mode of electing the mayor, as preſcribed by the charter, was as follows: that the mayor, aldermen, and burgeſſes, *or the greater part of them*, ſhould from time to time have a power of aſſembling themſelves, *or the greater part of them*, at and ſhould there continue till they *or the greater part of them* then there aſſembled, ſhould chuſe one of the aldermen to be mayor.

The election of the defendant was by a majority of the mayor, aldermen, and burgeſſes aſſembled; but the mayor, aldermen, and burgeſſes ſo aſſembled, did not conſtitute a majority of the whole corporation.

The queſtion was, Whether upon the true conſtruction of the words of the charter, a majority of the mayor, aldermen, and burgeſſes only, who were aſſembled, or whether a majority of the major part of the whole corporate body, ought to concur in the election of a mayor?

Serjeant

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Serjeant *Davy*, and Mr. *Wallace*, who ſhewed cauſe, ſtated that there were but five inſtances from the year 1597, to the preſent time, where a majority of the whole body were aſſembled at the election of a mayor: conſequently if the objection now made ſhould prevail, the corporation muſt be diſſolved. But this is the firſt time ſuch an objection was ever made in the caſe of an *indefinite* number of electors, and if good, may affect moſt of the corporations in the kingdom. The diſtinction is, that where the election is by the commonalty at large, thoſe who are aſſembled have a right to elect, though they do not conſtitute a majority of the whole body; and thoſe who are abſent are virtually repreſented by thoſe who are preſent. But if the number of electors be *definite*, as in the caſe of *Rex* verſus *Grimes*, capital burgeſs of *Yarmouth* *, there the majority of the whole body muſt firſt meet, and then the major part of thoſe ſo aſſembled may elect. And ſo the court held in that caſe, but ſaid it would have been different if the number of burgeſſes had been indefinite, and cited the caſe of the pariſhioners of *Wallingford*, cited by *Tanfield*, Chief Baron, in *Lane* 21. reported likewiſe in 6 *Vin. Abr.* 269 *pl.* 5.—*The Queen* verſus *Lock*, *Vin. Abr.* ſame page, *pl.* 8. where it was held, that if an act is referred to *be done by the commonalty*, there the majority of thoſe who are preſent will determine and bind the reſt.

* Since reported in 5 *Burr.* 2598.

Lord MANSFIELD. If in the ſpace of 170 years there have been but five elections by a majority of the whole body, and ſuch majority is neceſſary, the corporation muſt be diſſolved, unleſs the capital burgeſſes have been in poſſeſſion of their franchiſes for 20 years. But even then they are liable to an information filed by the *Attorney General*.

Mr. *Bearcroft*, Serjeant *Glynn*, and Mr. *Davenport*, *contra*, admitted, that where a power is given to any deſcription of perſons, ſuch as mayor, aldermen, and burgeſſes *generally*, to do an act, there it is competent to the major part of thoſe who are preſent to do ſuch act; but inſiſted that that was not this caſe: for here the charter moſt clearly meant there ſhould be no election of a mayor, but by a majority of the major part of the conſtituent members, ſpecified and impowered by the charter to elect. The words are, "that the mayor, aldermen and burgeſſes, *or the greater part of them*, ſhall, from time to time, "have power, upon ſuch a day to aſſemble *themſelves*, or *the* "*greater part of them*." Who are to aſſemble themſelves by this direction? At leaſt *the greater part of* the whole body?

And

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And the ſubſequent direction is, that they ſhall there continue till they, or the greater part of them, then there aſſembled, ſhall chuſe one of the aldermen to be mayor, *&c.* therefore, there muſt be a majority of the conſtituent body aſſembled.

As to the uſage, if the words of the charter were doubtful, the uſage under it might be evidence to explain the meaning of them. But here the terms of the charter are clear and expreſs, and, therefore, the corporation muſt conform to them. As to the conſequences that may enſue from the few inſtances in which the directions of the charter have been purſued; they are no ground for the court to refuſe an information; for if the words are clear, juſtice muſt be done, though it involve the diſſolution of the corporation, and inſiſted on *Rex* verſus *Grimes* as a caſe in point.

Lord MANSFIELD. Upon the words of the charter alone, I myſelf have no doubt about the conſtruction of it. In this corporation there are an indefinite number of freemen; and it is a corporation in which honorary freemen may be made.

It is in the nature of all corporations to do corporate acts; and where the power of doing them is not ſpecially delegated to a particular number, the general mode is, for the members to meet on the charter days, and the major part who are preſent do the act. But where there is a ſelect body it is a different thing, for there it is a ſpecial appointment. All the reaſoning therefore is different.

But ſuppoſe the words of the charter are doubtful, the uſage in this caſe is of great force; not, that uſage can overturn the clear words of a charter: but if they are doubtful, the uſage under the charter will tend to explain the meaning of them; eſpecially in a caſe like this, where, before the charter, the corporation conſiſted of an indefinite number of burgeſſes by preſcription, and where the charter itſelf added no new members, but only incorporated the old ones. Since the charter, namely, for theſe laſt 170 years, the major part of thoſe only who were aſſembled, have concurred in electing the mayor; and there are but five inſtances during that period, in which the members ſo aſſembled have conſtituted a majority of the whole body. My only doubt at preſent is, whether it ought not to be put upon the record if the parties are deſirous to try the queſtion, and to be at the expence; and therefore I think the rule ſhould be made abſolute in one, and enlarged as to the reſt.

ASTON

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REX *verſus* VARLO.

ASTON Juſtice. In the caſe of an indefinite number of burgeſſes, as there are in this corporation, I cannot conceive that the charter meant a majority of that indefinite number ſhould be preſent.

The uſage anterior to the charter of *Car.* 1. cannot alter the charter, but it will guide the conſtruction in a caſe where it does not plainly appear that the charter meant to vary ſuch former uſage. Therefore I concur with my lord, that the rule ſhould be abſolute as to one.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhburſt* concurred.

Lord MANSFIELD. The uſe of a trial will be to find the uſage.

Rule abſolute in one.

DRINKWATER and another, Aſſignees of DOWDING, *verſus* GOODWIN. *Friday, May 12th.*

A factor who becomes ſurety for his principal, has a lien on the price of the goods, ſold by him, for his principal, to the amount or the ſum for which he has ſo become ſurety.

THIS was an action brought by the plaintiffs, as aſſignees of the eſtate of *J. Dowding*, a bankrupt, for a ſum of money, for goods ſold and delivered to the defendant. Upon the general iſſue pleaded, a verdict was found for the plaintiffs damages 194 *l.* ſubject to the opinion of the court, upon the following caſe.

J. Dowding, the bankrupt, was a clothier, and employed *Edward Jeffries* a factor, who ſold to the defendant *Goodwin*, the cloths in queſtion, marked *J. Dowding*, *before* any act of bankruptcy committed by *J. Dowding*; but did not receive the money for them till *after* the action was brought. The cloths were ſold by *Jeffries*, as *factor*, and the defendant *Goodwin knew him to be ſo*, in the uſual courſe of buſineſs, and in his own name. The money was paid by *Goodwin* to *Jeffries*, after notice to him from the aſſignees not to pay it to *Jeffries*.

Edward Jeffries was a creditor of *Dowding*, for ſeveral ſums of money excluſive of the bonds hereafter mentioned; for which ſums he received full ſatisfaction by the money in his hands, or by cloths in his poſſeſſion. As to the bonds, *Dowding* borrowed money to the amount of 3,000 *l.* and upwards, and by letter bearing date the 1ſt of *May*, 1769, applied to *Jeffries*, his factor, to be ſecurity for him jointly in theſe bonds. The letter was as follows:

"Sir, I take the liberty of aſking you, whether, if I ſhould "meet with any ſum which the lender may think too large

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to retain, and is in law a continuation of the poſſeſſion. In this caſe no account was kept between *Goodwin* and the bankrupt; the only account was between *Goodwin* and *Jeffries*. The bankrupt could not have brought an action againſt *Goodwin*, without the intervention of *Jeffries*. If ſo, the aſſignees can be in no better ſituation than the bankrupt himſelf would have been in. *Jeffries* is in the ſame ſituation as the acceptor of a bill of exchange, who has a right to ſell the goods of the drawer, and to reimburſe himſelf with the value. But if ſelling the goods were ſuch a parting with the poſſeſſion as would deveſt the lien which he had before, the miſchief and inconvenience to trade would be endleſs. So here *Jeffries*, having advanced this money upon his own credit, when the goods came to his poſſeſſion, had a right to ſell them, and to retain the value to reimburſe himſelf. The poſſeſſion, therefore, remained as much as if the goods themſelves had remained.

2dly, This mode of dealing was no fraud upon any of the creditors, or upon the aſſignees. For *Dowding* could not have carried on his trade without money or credit. *Jeffries* not having money, lends him his credit and name, by becoming ſurety in theſe bonds; that is to all intents and purpoſes, the ſame thing as if he had lent him money; and it was not competent to *Dowding* to ſue *Jeffries* for any money he might receive, till *Jeffries* had diſcharged the amount of the bonds; for till then the balance was againſt *Jeffries*: therefore, the law and juſtice of the caſe is, that the fair balance ſhould now be ſettled between him and the creditors of the bankrupt. And ſo it was held, 2 *Chan.* Caſes, 36. Suppoſe a factor were to fail, and his aſſignees afterwards receive money for goods ſold by him as factor; it has been determined in that caſe, that the principal is not to come in as a creditor under the commiſſion, for the general balance, but ſhall receive the full value of the goods. For the ſame reaſon, the factor in this caſe is entitled to all the goods in his poſſeſſion.

Lord MANSFIELD.—I think you ſtate the material fact of the caſe contrary to the finding. The queſtion you make is, Whether the poſſeſſion continues? And to judge of that, the tranſaction ſhould be known. Now the tranſaction was thus: *Jeffries* ſold theſe goods to the defendant *Goodwin*, in his own name; without any reference to the principal, or without even making the principal creditor for them. But the goods are marked *J. Dowding*; therefore, the defendant muſt have known he was the

principal, and that was the reason of making that fact part of the case. 1775.

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I should be glad to know if there is any authority, where, after a factor had sold goods in the manner here mentioned, it has happened that the principal has forbid the vendee to pay the value to the factor, and the vendee has notwithstanding paid the factor. In this case the whole turns upon the circumstance of the assignees (who stand in the place of the bankrupt) having forbid the defendant to pay *Jeffries:* there can be no doubt, that where a factor, who is fully paid all his demands, becomes bankrupt, the property of all the goods remaining in his hands is in the principal, and he may sue for them in his own name.

Cur. advisare vult.

Afterwards, on *Tuesday* 16th of *May*, Lord *Mansfield*, after stating the case, delivered the opinion of the court, as follows:

It appears from the facts stated in this case, that the defendant *Goodwin* has taken upon himself to pay the money in question to *Jeffries*, after notice from the assignees not to pay it to him, and after, which I take for granted, an indemnity offered by them, and also an indemnity from *Jeffries*. It is, therefore, the case of *Jeffries;* and the question is between *Jeffries* and the assignees, which is entitled to receive this money.

The maxim of law which says, that it shall not be in the power of any man, by his election, to vary the rights of two other contending parties, is a very wise maxim, as well as a very fortunate one, for the parties who are so disputing; because, by giving notice to such person to hold his hand, and offering him an indemnity, he renders himself liable to the true owner, if after such notice he takes upon himself to decide the right. And, therefore, though the purchasor of goods from a factor has a right to pay him the money, and be discharged; yet when the principal and factor has a dispute, the buyer, with notice of such dispute, has no right to prejudice the title of the principal. This case, therefore, is in the nature of a bill of inter-pleader. The defendant is the stake holder, the assignees and *Jeffries* are contending, and the court is to decide.

Jeffries claims the money, as having a lien on it, and the assignees claim it as standing in the place of the bankrupt.

Jeffries claims it as having a lien. To consider the case therefore first upon the *general question*, we think that a factor who receives cloths, and is authorised to sell them in his own name, but

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but makes the buyer debtor to himſelf; though he is not anſwerable for the debts, yet he has a right to receive the money: his receipt is a diſcharge to the buyer; and he has a right to bring an action againſt him, to compel the payment; and it would be no defence for the buyer in that action to ſay, that as between him and the principal he (the buyer) ought to have that money, becauſe the principal is indebted to him in more than that ſum; for the principal himſelf can never ſay that, but where the factor has nothing due to him. There is no caſe in law or equity, where a factor having money due to him to the amount of the debt in diſpute, was ever prevented from taking money for cloths in his hands.

That being the general rule, let us ſee whether this caſe differs at all from it. It certainly does not. On the contrary, it is greatly ſtrengthened in the preſent caſe, for there is not the leaſt colour to ſuggeſt a fraud. But the principal and factor enter into a ſpecial agreement, by which the factor undertakes and actually pledges his credit to raiſe money, for the benefit of the principal; which money is to be worked up in cloths, and which cloths when ſo worked up, the principal agrees to ſend to the factor. The agreement therefore is, that he ſhall have a lien. For he ſays, "be ſecurity for the money, and I will ſend "you all the cloths."—What is the form in which the tranſaction is put? The factor knew very well that for a general balance of his accounts he had a lien, but he doubted whether ſuch lien would extend to a caſe in which he was only ſurety for his principal, and, therefore, he ſays, "I am led by the courſe "of the trade, to let the money be a joint-bond, *&c.*"

Therefore, we are all moſt clearly of opinion, that a factor has a lien on the price of goods in the hands of the buyer: and in this caſe, though he had not the actual poſſeſſion of them, yet as he had a power of giving a diſcharge, or bringing an action, he had a right to retain the money, in conſequence of his lien, as much as a mortgagee has by the title deeds of an eſtate in his hands, though he is not in poſſeſſion. Therefore, let there be,

Judgment for the defendant.

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DENN ex dim. BALDERSTON *verſus* BALDERSTON.

Same day.

IN ejectment it appeared at the trial, that *George Balderſton* being ſeiſed of the premiſes in queſtion, duly made his laſt will, bearing date the 15th of *April*, 1761, and thereby amongſt other things deviſed as follows: Alſo, I give to my ſon *Thomas Balderſton*, two hundred pounds, to be paid to him by my executrix, herein after named. Alſo I give to my wife *Elizabeth Balderſton*, and her heirs for ever, all my houſes at the eaſt end of *Newborough-Street*, in *Scarborough*. I alſo give to her, and her heirs for ever, my two tenements in *Longweſtgate* and *Cooke-Row*, in *Scarborough*, aforeſaid. Alſo I give to my three ſons, *George*, *William*, and *Gillis*, and to their heirs for ever, my houſe, at the end of the *apple-market*, in *Scarborough*, aforeſaid, and my cloſe, in *Falſgrave*, as tenants in common, and not as joint-tenants, when they come at age of 21 years, and the rents and profits of them to be received by my executrix, 'till that time, and employed for their maintenance, education, and benefit, during their minority, and as any of them come at age, their ſhare of the rents and profits thereof to be received by them. Alſo I give to my wife, my houſe at the upper end of *Newborough ſtreet*, in *Scarborough* aforeſaid, now in my occupation, with all the furniture thereto belonging, during her natural life, a proper part of the accruing profits or rents thereof to be applied for the maintenance and education of my three daughters, *Iſabella*, *Elizabeth*, and *Janet*, to whom, and their heirs for ever, I give the ſame, after the deceaſe of my ſaid wife, as tenants in-common, and not as joint-tenants. My will further is, and I do hereby order and direct, that *if* ANY *of my above-named children ſhall happen to die before they come of age of twenty-one years, and without lawful iſſue, then their property and ſhare in* ANY *of the above bequeathed premiſes ſhall be equally divided among the* REST *of my ſurviving children, ſhare and ſhare alike.*

Two of the younger ſons died under the age of *twenty-one* years, without iſſue. *William*, the ſurviving younger ſon, brought this ejectment for their ſhares. *Thomas* was of the age of 22 years, at the time of making the will. A verdict was "*children, ſhare and ſhare alike.*" The *eldeſt* ſon was *of age* at the date of the will. *Two* of the *younger* ſons died *under age*, and without iſſue. *Per cur.* The eldeſt ſon and the three daughters are equally entitled with the ſurviving younger ſon to the ſhares of the two deceaſed brothers.

Deviſe to the teſtator's *eldeſt ſon* of 200 *l.* alſo, to his *three* younger ſons G. W. and G. and their heirs, a houſe and cloſe, as tenants in common, *when they come at age of twenty-one years.* Alſo, to his wife, a houſe, and after her deceaſe the ſame to go to his *three daughters*, and their heirs for ever. And his will further was, "that "*if* ANY *of* "*his above* "*named* "*children* "ſhould "happen "to die "BEFORE "THEY "CAME OF "AGE, *and* "*without* "*iſſue*, then "*their* pro-"perty and "*ſhare in* "ANY *of* "*the above* "*bequeath-*"*ed premiſes* "*to be e-*"*qually* "*divided* "*amongſt* "*the* REST "*of his ſur-*"*viving*

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given for the plaintiff, ſubject to the opinion of the court, on the following queſtion, *viz.*

Whether *William* the ſurviving younger ſon is entitled to the whole of the houſe at the eaſt end of the *apple market*, in *Scarborough*, and the cloſe in *Falſgrave*; or the ſaid *Thomas*, and the daughters, or any of them, are entitled to any ſhares and parts thereof?

Mr. *Davenport*, for the leſſor of the plaintiff. The queſtion in this caſe is a queſtion of intention, and I contend the teſtator never meant the different claſſes into which he had divided the objects of his bounty, ſhould interfere with each other: but that their intereſts ſhould be wholly diſtinct. The claſſes are four. 1ſt, His eldeſt ſon. 2d, His wife. 3d, His three younger ſons. 4th, His three daughters. The clauſe in which he ſays, "if any, *&c.* of my above, *&c.*" muſt be confined to the daughters only; for the words "ſhall happen to die before the "age of 21 years," clearly ſhew that the teſtator could not mean to include *Thomas* his eldeſt ſon, becauſe he was of age at the time; therefore the words cannot be conſtrued in their literal ſenſe. If ſo, the queſtion is, whether the court does not ſee plainly, that the intention of the teſtator was to keep the claſſes mentioned, entirely ſeparate; and that if one or more of the younger ſons died, the ſurviving ſon or ſons ſhould take his or their part in excluſion of the daughters; and ſo if one or more of the daughters died, the ſurviving daughter or daughters ſhould take her or their ſhare, in excluſion of the younger ſons. No other conſtruction can ſatisfy the words, and therefore the leſſor of the plaintiff is clearly entitled.

Mr. *Norton*, *contra*, inſiſted that the teſtator certainly meant all his children ſhould be equally benefited by the death of any of them. If the conſtruction contended for, on the part of the leſſor of the plaintiff, were to take place, and two of the daughters had died, the ſurviving daughter would have had a better eſtate than the eldeſt ſon, which never could be the intention of the teſtator. He cited *Smith* verſus *Doran*, in *Scacc.* where the teſtator deviſed one fourth part of his property to his eldeſt ſon, who was of age at the time; and the other three fourths to his three younger ſons, who were all under age; and then added, "but if any of my ſaid children ſhould die before "21, then their reſpective property ſhall be divided amongſt "all my children ſhare and ſhare alike." One of the younger children died, and the court held the elder was equally entitled with his younger brothers. And upon the authority of this

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caſe, which he ſaid was in point, inſiſted that, *Thomas* the eldeſt ſon, and the three daughters, were equally entitled with the ſurviving younger ſons.

Lord MANSFIELD. There can be but one of two conſtructions of this will; either that the clauſe in queſtion relates to the diſtinct premiſes deviſed to the three ſons and the three daughters reſpectively, and ſo to make the ſubſtitution a limitation over, as between the three daughters, of their eſtate and as between the three ſons, of their eſtate; and the other is to blend them together.

ASTON Juſtice. In the preſent caſe I incline to think the teſtator did not mean to include his eldeſt ſon, becauſe the words are "if any of my children ſhall happen to die before the age "of 21," and the eldeſt ſon was of age at the time. As to the other children, if the word "reſpectively" had been put in, it would have been deciſive of his intention to keep the intereſt of the ſons diſtinct, as between them; and in like manner, the intereſt of the daughters diſtinct, as between them. I rather think it was meant to go to them reſpectively.

WILLES Juſtice. I think the teſtator meant to provide for his children as equally as he could, and, therefore, that his eldeſt ſon ſhould come in for his ſhare in the event which has happened. His eldeſt ſon was of age. His intention ſeems to have been, that if the younger children came of age they ſhould have an abſolute intereſt. But if they or any of them died under age, or without iſſue, then that their ſhare ſhould be equally divided amongſt the reſt of his ſurviving children. There is no reaſon why he ſhould be ſuppoſed to exclude his eldeſt ſon, and, as at preſent adviſed, I have no doubt he meant to include him in the event which has happened.

ASHHURST Juſtice, inclined to think the teſtator did not mean to exclude his eldeſt ſon; but gave no opinion.

Cur. adviſare vult.

Afterwards, on *Tueſday* the 16th of *May*, Lord *Mansfield*, after ſtating the caſe, delivered the opinion of the court as follows;

The queſtion turns upon the conſtruction of the clauſe by which the premiſes are deviſed over upon the contingency of *any* of the children dying *before* the age of 21 years, and without lawful iſſue.

One conſtruction contended for at the bar was, that it ſhould be taken *reſpectively*: that is, as a ſubſtitution of the eſtate deviſed to the three ſons, as between them; and again as a ſub-

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ſtitution of the eſtate deviſed to the three daughters, as between them; but that conſtruction cannot be maintained from the words; becauſe the teſtator expreſsly joins both the deviſes together: for he ſays, "their ſhare in *any* of the above bequeathed premiſes," ſo that he manifeſtly blends them together.

The next doubt upon the conſtruction of this will was, Whether *Thomas* the eldeſt ſon was to be included or excluded. Upon the *contingency* that is put in the clauſe in queſtion, namely, "if any of my above-named children ſhall happen to die *before* 21," *Thomas* muſt be excluded; becauſe he was of age at the time of making the will, therefore, he could not be meant by that part of the clauſe.

The next doubt upon the conſtruction was, Whether "the reſt of my ſurviving children" ſhould mean thoſe only who might die before 21, or whether it ſhould mean *all* the teſtator's ſurviving children. There were circumſtances thrown out at the bar, from whence it was inferred, that the teſtator was providing equally for all his children; but that does not appear upon the caſe; if it did, it would ſtrengthen the conſtruction which the court inclines to. But the court cannot ground their judgment upon matters not ſtated in the caſe. Upon what is ſtated, after ſome doubt, we are at laſt unanimouſly of opinion, that theſe words, "the *reſt* of my ſurviving children," take in *all* the ſurviving children; and conſequently include the eldeſt ſon. Therefore *William* the plaintiff, can only recover his ſhare of the premiſes in queſtion, equally with the other four ſurviving children, that is, a fifth part only.

Judgment for the plaintiff for a fifth party only.

Thurſday, May 16th.

The Earl of DARLINGTON *verſus* PULTENEY.

Common law power to *appoint* by *deed* executed in the preſence of two witneſſes, *ill* executed by a *will* — Otherwiſe, if the power had been to appoint by *any writing* or *inſtrument*, or other *general term*.

THIS was a caſe out of chancery, for the opinion of this court; and the material facts ſtated were as follow:

Sir *William Pulteney*, by his laſt will, bearing date the 30th of *April*, 1685, deviſed certain houſes and tenements, in the county of *Middleſex*, to his wife, for life. Remainder to his ſon *William Pulteney*, for life. Remainder to his grandſon *William Pulteney*, ſon of his ſaid ſon *William*, afterwards Earl of *Bath*, for life. Remainder to truſtees, to ſupport contingent remainders. Remainder to the firſt and other ſons of his ſaid grandſon *William* ſucceſſively in tail male. Remainder to the

ſecond

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ſecond and other ſons of the ſaid teſtator's ſaid ſon *William*, ſucceſſively in tail-male. Remainder to the ſaid teſtator's ſon *John*, for life. Remainder to the ſaid teſtator's grandſon *Daniel*, for life. Remainder to truſtees, to ſupport contingent remainders. Remainder to the firſt and other ſons of the ſaid *Daniel*, ſucceſſively in tail-male; with remainder to the ſaid teſtator's grandſon *Henry*, for life; with remainder to truſtees, during his life, to ſupport contingent remainders: with ſeveral remainders over. Remainder to the ſaid teſtator, and the heirs of his body. Remainder to the teſtator's ſaid ſons *William*, *John*, *Charles*, and *Thomas*, ſucceſſively in tail general. Remainder to *Henry Guy*, Eſq; and his heirs for ever.

Afterwards, the ſaid *William* the grandſon, then Earl of *Bath*, being then tenant for life in poſſeſſion, of the ſaid houſes and tenements under his ſaid grandfather's will, and being alſo entitled under the will of the ſaid *Henry Guy*, to the ultimate remainder in fee, expectant on the ſaid ſeveral particular eſtates limited by the will of his ſaid grandfather: And *William Pulteney*, Eſq; commonly called Lord *Pulteney*, the only ſon of the ſaid Earl of *Bath*, being then of age, and being under the ſaid will of Sir *William Pulteney*, tenant in tail in remainder, of the ſame houſes and tenements, immediately expectant on the deceaſe of his ſaid father; the ſaid Earl of *Bath*, and Lord *Pulteney*, by indenture of bargain and ſale bearing date the 2d *January*, 1753, conveyed the ſame to *Thomas Newton*, to make him tenant to the *præcipe* for the purpoſe of ſuffering two recoveries of the ſaid premiſes, the uſes of which it was declared ſhould be, after limiting the ſame to the Earl of *Bath*, for life, and ſubject to a jointure of 1,500 *l.* a-year to lady *Bath*, "To "the uſe of ſuch perſon or perſons, and for ſuch eſtate or eſtates, "and in ſuch manner and upon ſuch truſts, and ſubject to ſuch "proviſoes, powers, and agreements, and for ſuch intents and "purpoſes, as the ſaid *William* Earl of *Bath*, and *William* lord "viſcount *Pulteney*, by any their *deed* or *deeds*, (either with "or without power of revocation) to be by both of them ſealed "and delivered in the preſence of two or more credible witneſſes "ſhould from time to time jointly grant, direct, limit, or ap-"point. And in caſe of the death of either of them the ſaid "*William* Earl of *Bath*, and *William* lord viſcount *Pulteney*; then "as the *ſurvivor* of them, by any *deed* or *deeds*, to be executed "as aforeſaid, ſhould from time to time alone grant, direct,

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" limit, or appoint, and in default of ſuch appointment, to " the uſes they before ſtood limited to, by Sir *William Pulteney*'s " will."

In *Hilary* term, 1753, the two common recoveries were duly ſuffered.—On the 12th of *February*, 1763, Lord *Pulteney* died, without having executed or joined with his father in the execution of any deed of appointment of any of the ſaid hereditaments, and without iſſue.—On the 21ſt of *May*, 1763, the earl of *Bath* made his will, and thereby gave all his real eſtate whatſoever and whereſoever, other than and except the piece or parcel of ground, meſſuage, or tenement, with the erections and buildings therein after mentioned to be in the poſſeſſion of the earl of *Egremont*, to his brother General *Pulteney*, in fee; and limits the ſaid piece or parcel of ground to his ſaid brother, for life, in ſtrict ſettlement. This piece of ground was part of the eſtate late of Sir *William Pulteney*, and paſſed under the limitations in his will, to the Earl of *Bath*, and is comprized in the indenture of the 2d of *January*, 1753, and the recovery ſuffered in *Middleſex*, in purſuance thereof.

The Earl of *Bath* died on the 7th of *July*, 1764, without leaving iſſue. *General Harry Pulteney*, who was ſecond ſon of *William Pulteney*, the ſon of Sir *William Pulteney*, ſurvived his brother the Earl of *Bath*, and upon his death became heir of the body of Sir *William Pulteney*, and upon the death of the Earl of *Bath* came into poſſeſſion of the eſtates late of the ſaid Sir *William Pulteney*. General *Pulteney* by his will, dated 4th *Auguſt* 1767, deviſed all his meſſuages, grounds, lands, tenements, hereditaments, and real eſtate, in the county of *Middleſex*, and alſo all and every his manors, meſſuages, lands, tenements and hereditaments, and real eſtate in the county of *Somerſet*, or any county adjacent to the ſaid county of *Somerſet*, and in the counties of *Montgomery*, *Salop*, and *York*, to truſtees therein named, for 500 years. Remainder to the uſe of *Frances Pulteney*, for life. Remainder to the firſt and other ſons of the body of the ſaid *Frances Pulteney*, ſucceſſively in tail male, with the ſeveral remainders over, and died on the 26th of *October* 1767, without iſſue; and upon his deceaſe, the defendant Mrs. *Frances Pulteney*, grand-daughter of *John*, the ſecond ſon of Sir *William Pulteney*, became heir of the body of the ſaid Sir *William Pulteney*, and as ſuch, became entitled to an eſtate-tail in ſuch of the ſaid hereditaments as were deviſed by the will of Sir *William Pulteney*, by virtue of the limitations in that will to Sir *William Pulteney*, and the heirs of his body, if that

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that limitation was then in force. All the preceding limitations under that will being ſpent and determined, upon the deceaſe of General *Pulteney*, without iſſue.

The queſtion ſtated for the opinion of the court was, Whether ſo much of the eſtate comprized in the indenture dated the 2d of *January*, 1753, as was taken by the will of Sir *William Pulteney*, deceaſed, paſſed by the will of *William* earl of *Bath*, deceaſed?

Mr. *Kenyon*, for the plaintiffs.—The queſtion is, Whether the *will* of the Earl of *Bath* is a good appointment, under the power contained in the indenture of 2d *January*, 1753; or in other words, Whether it is for this purpoſe a *deed?* I contend it is: And firſt, it is obſervable with reſpect to powers in general, that they were a ſpecies of tranſmutation of property unknown to the common law, prior to the ſtatute of uſes, 27 *Hen.* 8. *c.* 10. At common law the only ancient conveyance of corporeal freeholds, was by livery of ſeiſin: prior to the ſtatute, courts of equity alone entertained queſtions of this kind; and the mode of conſtruction which they exerciſed at that time, was the ſame as they now exerciſe in the caſe of truſts. When the ſtatute of uſes gave the courts of law a power to judge of uſes, it muſt be ſuppoſed the legiſlature intended they ſhould judge of them by the ſame rules; for the only reaſon of giving the cognizance to them, was for the ſake of brevity and diſpatch. However, in ſome of the early caſes, the courts of law conſtrued powers very rigidly.

Powers are of three kinds.—*Firſt*, Naked powers, unaccompanied with any intereſt. To this ſpecies of powers only, the common law authorities apply; and the conſtruction of them, like the conſtruction of conditions to which they were compared, has been very rigid. *Secondly*, Powers granted to the donee of a particular eſtate. Theſe powers having their foundation in the will of the donor, were formely conſtrued ſtrictly in favour of the remainder-man; but no further: and of late even that ſtrictneſs has been thought wrong; ſo that now they are taken more liberally. 1 *Peere Williams*, 244. *Beale* verſus *Beale*.—2 *Burr.* 1,136. *Thirdly*, Powers reſerved by the donor to himſelf. Theſe powers have always been taken largely; and of this claſs is the preſent power. For though before the recovery was ſuffered, the earl of *Bath* was not abſolute owner of the inheritance, yet after the recovery he became ſo, and Lord *Pulteney* was in the ſame ſituation. The queſtion then will be, Whether

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it was the intention of Lord *Bath* to diſpoſe of this property. That it was his intention is manifeſt by the deviſe of *Egremont* houſe. If ſo, the only remaining queſtion is, Whether the inſtrument he has made uſe of was proper for the purpoſe? Now though every will is certainly not a deed, yet if a will has all the eſſentials of a deed, as this will has, it ſhall be taken to be a deed. *Spelman* in his gloſſary, title *factum*, and title *teſtamentum*, defines them both by the common technical name of *chartæ*. But a ſtrong circumſtance to ſhew that the Earl of *Bath* meant this ſhould be taken as a deed is, that the will is ſealed, which is no part or ingredient of a will; but is of the very eſſence of a deed. Therefore, the ſubſtantial part of what the inſtrument giving the power enjoins has been complied with, which is all that is neceſſary. The circumſtances are but cautions to prevent impoſition: and ſo it is expreſsly laid down in *Aſhton* verſus *Smith*, 1 *Chan.* Caſes, 263, 4. Lord *Bath* verſus *Montague* 3 *Chan.* Caſes, 126. There the deed of revocation by the terms of the power was to be executed by ſix witneſſes, three of whom were to be peers, whereas it was executed by three witneſſes only. But Lord *Somers* ſaid, that had the duke in *Jamaica* had an expreſs *deliberate intention* to revoke, and, to teſtify it, had gone as far in purſuance of the circumſtance as his condition in thoſe parts would admit, that is, by having the competent number of witneſſes, though none of them were peers, equity might have cured the defect. In *Hob.* 277. it is held that the judges ſhould be *aſtuti* to aſſiſt the intention of parties, rather than work a wrong by enforcing rigid rules. The ſame doctrine is held in *Sneyd* verſus *Sneyd*, in *Canc.* 3d *February*, 1747. *Kibbet* verſus *Lee*, *Hob.* 312. *Tollett* verſus *Tollett*, 2 *P. Williams*, 489. and Lord *King*'s opinion, in 2 *P. Williams*, 506. Theſe authorities agree, that where the intention of the party to do the act is manifeſt, the power ſhall be conſtrued liberally, and the execution of it favourably in ſupport of ſuch intention. Here the intention is manifeſt by a ſolemn and deliberate act, which, though not a deed, has all the requiſites of a deed; and, therefore, in every material reſpect is ſubſtantially and eſſentially the ſame.

Mr. *Dunning* for the defendant. A deed and a will are totally different things. The eſſence of a deed is ſealing and *delivering*, *Co. Litt.* 35. *b.* As to the intention of the Earl of *Bath* that does not appear ſo clear, for the deviſe of *Egremont* houſe is not of itſelf a ſufficient proof that he meant to diſpoſe of this property. With reſpect to the power, it is not of the claſs under

der which it has been ranked; for it is not a power proceeding from any original title or ancient dominion in Lord *Bath*: for at the time of the recovery, Lord *Bath* was only tenant for life, with the reverſion in fee. The only object of the recovery was to let in Lady *Bath*'s jointure, and when that purpoſe was ſatisfied, Lord *Bath* remained in all other reſpects tenant for life, in ſtrict ſettlement.—The power was a power given by his ſon Lord *Pulteney*, with a view of enabling them to make a family ſettlement by ſome joint act, during their lives, or to be exerciſed in caſe of the death of either of them, by the ſurvivor.

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The caſes cited are not applicable to the preſent queſtion. *Sneyd* verſus *Sneyd*, was a caſe where children were unprovided for: and *Tollett* verſus *Tollett*, 2 *P. Williams*, 489. was the caſe of a wife under the ſame circumſtances. But Lord *Darlington* is neither wife, child, or creditor. And he relied on the caſe of *Dormer* verſus *Parkhurſt*, 2 *P. Williams*, 506. as a caſe in point.

Lord MANSFIELD.—Under the will of Sir *William Pulteney*, the earl of *Bath*, before he made his will, ſubject to his own chance of having iſſue male, and to the chance of his brother and ſeveral other perſons having iſſue male, had, as heir of the body of the teſtator, an eſtate tail in the premiſes in queſtion; which, if not docked by a common recovery, would have come to General *Pulteney*, his brother. He could, therefore, by virtue of the will of Sir *William Pulteney*, deviſe nothing by his own will but his reverſion in fee, which after an eſtate-tail in an adverſe claimant, was of no great value. To enable him to deviſe, it was neceſſary that he ſhould reſort to a common recovery, which however could not be ſuffered, without the aſſiſtance of his ſon. His ſon joined in it; and by this recovery, and alſo by the deed to make a tenant to the præcipe, it is provided, "that ſubject to "the earl of *Bath*'s eſtate for life, and a jointure of 1,500*l.* a "year to Lady *Bath*, the eſtate ſhould be limited to ſuch perſon "or perſons, and upon ſuch truſts as the earl of *Bath* and Lord "*Pulteney* by any their *deed* or *deeds*, either with or without "power of revocation, to be executed under their hands and "ſeals, and ſigned in the preſence of two witneſſes, ſhould "from time to time grant, direct, limit, and appoint; and in "caſe of the death of either of them, then that the ſurvivor of "them, by any deed or deeds executed as aforeſaid, ſhould alone "grant, direct, limit, or appoint, and in default of ſuch direc"tion, and in the mean time to all the uſes of Sir *William* "*Pulteney*'s will."—After this, the earl of *Bath* makes his will,

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and by it he gives every thing to General *Pulteney*, *abſolutely*, except the ſpot of ground upon which the earl of *Egremont's* houſe was built, which he gives in *ſtrict ſettlement*. Now theſe premiſes are a part of the eſtate deviſed by the will of Sir *William Pulteney*, and one uſe made of it at the bar is, that Lord *Bath* meant to ſettle theſe premiſes in the particular manner ſtated: and, therefore, meaning ſo to do, as againſt General *Pulteney*, there is a ſtanding condition, namely, that if he will take any part he muſt not diſturb the other deviſees. But that is not the queſtion ſent to us; and as to the intention of Lord *Bath*, there is no ſtrong intention one way or the other. The queſtion before us is, Whether by the general words of the will, this power ſo created, is well executed?

Be the value of the eſtate what it may, it does not alter the difficulty of the queſtion: whether it be worth 10*l.* or 10,000*l.* it is the ſame thing; if the court has no doubt on a queſtion, it is due to the parties that we ſhould deliver our opinion, without allowing them to litigate the matter further, in a ſecond or third argument.

I have no particle of doubt on this queſtion. It is very difficult to maintain, on any principle of law, reaſon, or convenience, a diſtinction between *equitable* and *legal* executions of powers; which were originally, in their nature, equitable, but are by the ſtatute of uſes transferred to common law. Mr. *Kenyon* has ſaid very truly, that at common law powers were unknown. They were modifications of truſts, and directions to the truſtees, which bound his conſcience, and which he was compellable in a court of equity to execute. The ſtatute of uſes transferred entirely all that was equitable into a legal modification; and the courts of law were then bound to aſk what was the equity; becauſe the ſtatute ſaid, that the law ſhould follow the equity. It has likewiſe been very truly ſaid, that there were few caſes upon the execution of powers before the *ſtat.* 27 *H.* 8. *c.* 10. and none have come down to our time by way of precedents. Powers, therefore, being a new thing, and the courts of law having no equitable precedents in point to guide them, compared them at firſt to conditions which they are not at all like; and conſequently held that they ſhould be conſtrued ſtrictly. They looked upon them in the light of powers veſted in a third perſon over the eſtate of another man; whereas, in fact, they are only a different ſpecies of ownerſhip and enjoyment of property. But a long ſeries of precedents has now ſettled in the court of chancery,

cery, that in the conſtruction of powers, wherever the power is executed for a *meritorious* conſideration, namely, as a proviſion for a wife or child, or for the benefit of creditors or purchaſers, there the preciſe form preſcribed for its execution need not be ſtrictly purſued; and if it is now ſettled it is ſettled on principles that exiſted before. 1775. EARL of DARLINGTON verſus PULTENEY.

That being the caſe, courts of law ought to follow equity; becauſe there ſhould be a general rule of property: and if the courts of equity ſay, we will preſume that where the execution is for a meritorious conſideration, a ſtrict adherence to the preciſe form was not intended, and therefore it is not neceſſary; the moment the ſame rule is fixed and adopted at law, every man who creates, and every man who is to exerciſe a power, underſtands what he is to do. In the conſtruction of powers *originally* in their nature *legal*, courts of equity muſt follow the law; be the conſideration ever ſo meritorious: for inſtance, powers by a tenant in tail, to make leaſes under the ſtatute, if not executed in the requiſite form, no conſideration ever ſo meritorious will avail. So with reſpect to powers under the civil-liſt act, powers under particular family entails, as the caſe of the duke of *Bolton*, *&c.*; equity can no more relieve from defects in them, than it can from defects in a common recovery. The principle upon which the rule of conſtruction in theſe caſes is founded is, that there is nothing to affect the conſcience of the remainder man. Therefore it is difficult upon principles to maintain any diſtinction between equitable and legal execution of powers. In the caſe of the Earl of *Bath*, *abroad*, where it was required that the power ſhould be executed by ſix witneſſes, three of which were to be peers of the realm, there being no peers there, if he had got ſix other people to ſign and ſeal, and conform to the requiſites of the power, it might have been good on account of the impoſſibility of executing it in any other way; but there is no impoſſibility in the preſent caſe.

We come then to the conſtruction of the preſent power, and to ſay whether the will of Lord *Bath* is a good execution of it. As to that queſtion, in conſtruing powers, there have, as I ſaid before, been ſome pretty narrow caſes: but I think, as being a ſpecies of property, they ſhould be conſtrued liberally. *Kibbett* verſus *Lee*, in *Hob.* 312. is a very proper deciſion.—As to the caſe of *Dormer* verſus *Thurland*, 2 *P. Williams*, 506. it goes a great way. There, a power was given by will, or any writing in nature of a will, ſealed and atteſted by three or more witneſſes, to *Baron* and *Feme*, to charge the premiſes with 2,000 *l.* upon the death of either firſt: the huſband died firſt, and by will under

1775. under his hand, atteſted by three witneſſes, but *not ſealed*, charged the premiſes with 2000*l.* It was there ſtrongly contended that the will was a ſufficient execution of the power, being made according to the ſtatute of frauds.

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Lord *King* was of opinion, that it was a good execution of the power, becauſe by will; and I own I ſhould incline to that opinion. But it was determined by the judges of *R. B.* that it was not.

There are two caſes however, that were lately decided in the Houſe of Lords, which have been conſtrued more liberally. The firſt is a caſe of the Earl of *Roſſcommon* againſt *Fowkes*, on the 3d *April*, 1745, on an appeal from *Ireland*. *Fowkes* and his wife made a ſettlement of the wife's eſtate, with a power to the wife on contingencies which happened, in theſe words, "by any *writing* under her hand and ſeal atteſted by two credi- "ble witneſſes, notwithſtanding her coverture, and as if ſhe "was ſole and unmarried; and by the ſame or any other *deed*, "notwithſtanding her coverture, to grant, limit, and appoint, "*&c.*" She, by *will* duly executed, without reference to her power, deviſed her lands within that power, and the queſtion was, "whether the power was well executed by the *will?*" The court of common pleas in *Ireland*, certified to the court of chancery that it was; and ſo the Houſe of Lords here adjudged it according to the opinion of the judges who attended. Now there were only two witneſſes; it was to be "by the ſame," or "any other *deed*." It was contended theſe words did not apply to a will; but they laid hold of the words "any *writing*."

There was another caſe from *Ireland* laſt year in the Houſe of Lords, which was determined according to the opinion of the judges who attended*. It was a power to let leaſes for any time not exceeding 31 years, *or* three lives to *commence in poſſeſſion*. The execution of the power was a grant of a leaſe for 31 years, or three lives, *whichever ſhould laſt longeſt*. This, it was contended, was in manifeſt oppoſition to the power: becauſe, inſtead of being a leaſe for one or other of the terms *expreſsly* as the power directed, it was a leaſe for one or other, as chance ſhould direct. But according to the opinion of the judges preſent, it was a good execution of the power for 31 years; and they rejected the words "three lives." The doctrine of theſe authorities applies only to caſes where there are words to lay hold of. But the difficulty in the preſent caſe is, that there are no words to lay hold of. The firſt requiſite which the power preſcribes is impoſſible to be performed by will; which is, that it ſhall be by *joint deed* of Lord *Bath* and his ſon. Now there cannot be a *joint will*. It is true the

* *Comyns*, Leſſee of Lord *Netterville*, and Sir *Charles Burton* verſus *Marſhall*.

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ſurvivor has the ſame power. But then it is emphatically reſerved to be executed by "*deed:*" Now the word deed in the underſtanding of law has a technical ſignification, to which a will is in no reſpect applicable. If any words had been thrown in, ſuch as writing, inſtrument, or other term of a general comprehenſive meaning, it might have been fair to have taken advantage of it in favour of the intention. But here are no ſuch general words, nor any meritorious conſideration. If there were, it might have fallen within the reaſoning of *Tollett* verſus *Tollett*, 2 *P. Williams*, 489. and all the other caſes which ſay that in the execution of powers for a meritorious conſideration, it is not neceſſary ſtrictly to adhere to the preciſe form. But thoſe very caſes ſhew, that where there is no meritorious conſideration, the intention of the perſon who creates the power cannot properly be fulfilled, unleſs the form is ſtrictly purſued. Therefore in this caſe there does not ſeem to me a poſſibility of ſaying that a will is a deed within the terms of this power; and whatever the conſequence may be, as we are very clear in our opinion, the juſtice of the caſe requires that we ſhould deliver that opinion *now*, and certify accordingly.—The certificate was in theſe words:

"Having conſidered the above caſe, and heard counſel on both ſides, we are of *May* 17, "opinion that the *power* given by the declaration of the uſes of the recovery above- 1775. "mentioned was not duly executed by the will of the late Earl of Bath: and con- "ſequently, that only the reverſion in fee of the premiſſes compriſed in the ſaid re- "covery, paſſed by his ſaid will."

PIERCE *verſus* BARTRUM. *Same day.*

THIS cauſe came before the court upon a demurrer to a declaration in debt, brought by the plaintiff, as chamberlain of the city of *Exeter*, againſt the defendant, for ſlaughtering two oxen within the city of *Exeter*, contrary to a by-law made by the mayor and common council of *Exeter*, under a general power given them by charter, *anno* 3 *Eliz.* to make by-laws. The terms of the by-law were as follow:

That no butcher or other perſon ſhould within the walls of the ſaid city ſlaughter any beaſt, upon pain to forfeit for every bull, ox, cow, or heifer, ſo ſlaughtered as aforeſaid, the ſum of 40 *s.* and for every other beaſt ſo ſlaughtered as aforeſaid, the ſum of 20 *s.* And that no butcher or other perſon ſhould keep any ſwine within the walls of the ſaid city, nor any ſtinking filth, garbage, or annoyance, within his houſe, curtilage, or backſide, upon pain to pay for every time ſuch butcher or other perſon ſhould ſo offend, the ſum of 5 *l.*

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The declaration charged the defendant to have had notice of the ſaid by-law: but did not ſtate him to be free of the city of *Exeter*.

Mr. *T. Cowper*, in ſupport of the demurrer, objected that this by-law was void; 1ſt, as being *in reſtraint of trade:* and 2dly, becauſe it included perſons who were *not free* of the city, without any *cuſtom* ſhewn to warrant it. The prohibition is againſt ſlaughtering any ox, bull, or cow, within the walls of the city of *Exeter*. This is a common law right, and nothing but a cuſtom can controul it. If there were ſuch a cuſtom the defendant no doubt, if he choſe to reſide there, would be bound to take notice of it.

But without ſuch a cuſtom he is not, becauſe he has no means of knowing that ſuch a by-law exiſts.

Serjeant *Glynn*, *contra*, inſiſted that this by-law was not in reſtraint of trade; if it were, he agreed the objection would hold. But the prohibition in this caſe was a nuiſance at common law, and alſo by the *ſtat.* 4 *H.* 7. *c.* 3. and inſtanced ſimilar by-laws in *London*, againſt exerciſing the trade of a butcher in *Cheapſide*, and againſt brewers and tallow-chandlers in cloſe parts of the city. As to the ſuppoſed ignorance of the party, he ſaid it was an eſtabliſhed rule of law, that whoever comes to reſide in any place, is for the time being ſubject to the local juriſdiction of ſuch place: and, therefore, all the inhabitants within the limits of a corporation, are liable to the laws made by them for the good government of the community, even if not admitted to the freedom of it.

Lord *Mansfield*. This is a very clear caſe. The by-law in queſtion is not a *reſtraint* of trade, but only a regulation of it in this particular city: and it is made in confirmation of the act of parliament which has been mentioned. As to the objection that the defendant was a ſtranger, what my brother *Glynn* has ſaid is a complete anſwer to it; namely, that he is an inhabitant *pro hâc vice*, and conſequently is bound by the ſame regulations as the other members of the corporation are. Therefore I am of opinion the by-law is good, and that the demurrer muſt be overruled.

Aſton Juſtice. I am entirely of the ſame opinion. The defendant is ſubject to the local government of the corporation, though he is not a member of it. As to the by-law itſelf, it is certainly not a reſtraint of trade, but a regulation only; and I think

think a reaſonable one, and therefore it ſhall bind the inhabitants. 1775.

Willes and *Aſhhurſt* Juſtices, were of the ſame opinion.

Demurrer overruled.

PIERCE *verſus* BARTRUM.

DENN ex dim. WILLIAM BURTON and MICHAEL BURTON *verſus* CATHARINE BURTON. *Friday, May 19th.*

IN ejectment a verdict was found for the plaintiff, ſubject to the opinion of the court upon a ſpecial caſe, the material facts of which were in ſubſtance as follow:

That the teſtator, *William Burton*, was ſeiſed in tail general of an eſtate called *Owlerton*, in the county of *York*, ſubject to an eſtate for life therein to one *Margaret Bamforth* widow, for her jointure, and ſubject alſo to an eſtate for life therein to his wife, for her jointure. He was alſo ſeiſed of an eſtate for life, in the manor of *Wadſley* in the ſaid county, with remainder to his children, on the body of his ſaid wife to be begotten, for ſuch eſtates and in ſuch proportions as he ſhould by deed or writing, or by his laſt will appoint. He was alſo ſeiſed of ſeveral other lands and premiſes. He had by his ſaid wife five ſons, *George*, *John*, *William*, *Michael*, and *Robert*, and two daughters. He was likewiſe poſſeſſed of a conſiderable real and perſonal eſtate: and being ſeiſed as aforeſaid, by his will bearing date 24th *June*, 1761, amongſt other things deviſed as follows:

"I give, deviſe, limit, direct and appoint unto my ſecond "ſon *John Burton*, his heirs and aſſigns for ever, all that the "manor of *Wadſley*, in the pariſh of *Eccleſfield*, in the county "of *York*, &c. Provided always and upon condition neverthe-"leſs, and it is my mind and will, that if it ſhall ſo happen that "my eldeſt ſon *George Bamforth Burton* ſhall die in the life-"time of my ſaid ſon *John Burton*, without leaving any iſſue "of his body then living, and by reaſon thereof the manor of "*Owlerton*, in the ſaid pariſh of *Sheffield*, and other the eſtate "now ſettled in jointure upon *Margaret Bamforth*, of *High-"houſe* aforeſaid, widow, of which my ſaid ſon *George Bamforth* "*Burton* will become ſeiſed in poſſeſſion at the death of the "ſaid *Margaret Bamforth*, in caſe he ſhall be then living, ſhall "*deſcend* and *come* to him my ſaid ſon *John Burton*, that then "and *in that caſe* I give, deviſe, limit and appoint the ſaid ma-"nor of *Wadſley*, with the rights, members, and appurtenances "thereof,

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"thereof, and the ſaid capital meſſuage or manor houſe, with "the out-houſes, lands, tenements, and hereditaments, here- "in before given, deviſed, limited, and appointed unto my ſaid "ſon *John Burton*, and his heirs, unto and *to the uſe* and "behoof of my ſons *William Burton* and *Michael Burton*, their "heirs and aſſigns for ever, equally to be divided between "them ſhare and ſhare alike, to take as tenants in common, and "not as joint-tenants; PROVIDED always and upon this further "condition nevertheleſs, and it is my mind and will, that if it "ſhall ſo happen that both of them my ſaid ſons *George* and "*John* ſhall die in the life-time of my ſaid ſon *William*, with- "out leaving any iſſue of their or either of their body or bodies "then living, and by reaſon thereof the ſaid manor of *Owler-* "*ton*, and the ſaid eſtate ſettled in jointure on the ſaid *Marga-* "*ret Bamforth* as aforeſaid, ſhall *deſcend* and *come* to him my "ſaid ſon *William Burton*, then and *in that caſe* I give, deviſe, "limit, and appoint the ſaid manor of *Wadſley*, with the ſaid "capital meſſuage, lands, tenements, and hereditaments, here- "in before limited and appointed unto my ſaid ſon *John*, unto "and *to the uſe* of my ſaid ſons *Michael Burton* and *Robert* "*Burton*, their heirs and aſſigns for ever, equally to be di- "vided between them ſhare and ſhare alike, to take as tenants "in common, and not as joint-tenants. PROVIDED further "and upon condition nevertheleſs, and it is my mind and will "that if it ſhall happen that they my ſaid ſons *George*, *John*, "and *William*, ſhall all of them happen to die in the life-time "of my ſaid ſon *Michael*, without leaving any iſſue of their or "any of their body or bodies then living, and by reaſon thereof "the ſaid manor of *Owlerton*, and other the ſaid eſtate ſettled "in jointure on the ſaid *Margaret Bamforth*, ſhall *deſcend* and "*come* to him my ſaid ſon *Michael*, then and *in that caſe*, I "give, deviſe, limit, and appoint the ſaid manor of *Wadſley*, "with the manor-houſe, *&c.* and all other the meſſuages, "lands, tenements, and hereditaments, herein before limited and "appointed to my ſaid ſon *John*, unto and to the only uſe and "behoof of my ſaid ſon *Robert Burton*, his heirs and aſſigns "for ever."

That *George Bamforth Burton* died without iſſue, in *July* 1762, in the life-time of the teſtator; who died on the 19th of *May* 1764, without altering or revoking his will; whereupon *John*, his ſecond ſon, entered into poſſeſſion of the manor and eſtate in *Wadſley*, and continued to receive the rents and profits

thereof till his death on the 14th *November*, 1772: and by his will dated *July*, 1770, gave all his eſtate to the defendant *Catharine Burton* his wife, and left iſſue only one daughter. The queſtion for the opinion of the court was, whether *William Burton* and *Michael Burton*, the leſſors of the plaintiff, are entitled to the ſaid manor of *Wadſley*, and the capital meſſuage and eſtate called *Wadſley-Hall Farm*, or not?

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Mr. *Davenport* for the plaintiffs, ſtated the queſtion to be, whether upon the death of *George*, *William* and *Michael Burton* were entitled to the manor of *Wadſley*, in the life time of *John*; and inſiſted they were.—The queſtion is a queſtion of intention; and upon the plain conſtruction of the will, it is clear that the teſtator meant to keep the eſtate of *Wadſley* and the eſtate of *Owlerton*, from uniting in any one ſon, except *Robert* the youngeſt. If ſo, it would be a forced conſtruction to ſay, the words "*deſcend and come*," mean an actual "*coming into poſ-*" *ſeſſion*:" becauſe in that caſe, if *George* had died on one day, and the jointreſs the next, the eſtates would have united in *John*; and then even if *John* had died without iſſue, the younger brothers never could have taken; becauſe his widow would have been entitled. Therefore, upon the plain conſtruction of the words, and the clear intention of the teſtator, the plaintiffs are each entitled to a moiety of the manor of *Wadſley*.

Mr. *Tooker*, *contra*. The queſtion is, Whether the family of *John* ſhall in any event loſe the manor of *Wadſley*, till they get the poſſeſſion of *Owlerton*: and he inſiſted they ſhould not. The intention of the teſtator was to give a permanent proviſion to *John*, and in the event of his elder brother *George* dying without iſſue, to make that proviſion better, by ſubſtituting the manor of *Owlerton* for that of *Wadſley*. If ſo, the conſtruction muſt be, that the eſtate at *Owlerton* muſt come into poſſeſſion before the deviſe over of *Wadſley* to the plaintiffs can take place, and conſequently till that event happens they are not entitled.

Lord MANSFIELD. Upon the words of the will there are two branches of contingency: 1ſt, "If it ſhould ſo happen that "*George* ſhould die without iſſue in the life-time of *John*;" and 2dly, "if by reaſon thereof the lands in jointure ſhould "deſcend and come to *John*." But what creates the puzzle and doubt is, that there are two ways in which the expreſſion "deſcend and come," may be conſtrued. 1ſt, It may mean a coming *into poſſeſſion* in oppoſition to the outſtanding jointure.

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If there were no other way of anſwering this proviſo, it would be very ſtrong in favour of the defendant. But it may likewiſe mean, if in fact it ſhall deſcend and come; which is the caſe that has happened. To be ſure, if at all events the eſtate in jointure muſt have come to *John*, there would have been no occaſion for inſerting this proviſo. But it was in the power of *George* to have barred all the remainders if he had lived, and to have prevented the eſtate from coming to *John* at all. On the other hand, the circumſtance of the teſtator *beginning* with the *ſecond* ſon in his deviſe of the *Wadſley* eſtate is material. We will think of it.

Afterwards, on the 28th of *May*, in this ſame term, Lord *Mansfield* after ſtating the caſe, delivered the opinion of the court as follows:

The queſtion is, Whether upon the death of *George*, in the life-time of the widow, *John* has loſt the poſſeſſion of the manor of *Wadſley*?

Firſt, to conſider it upon the words of the will, there is expreſsly a *double* contingency, upon which the eſtate of *Wadſley* is given over: For not only *George* was to die without iſſue, in the life-time of *John*; but the lands in jointure, namely, the eſtate of *Owlerton*, were to deſcend and come to him. Now there are two ways by which theſe lands might have been prevented from coming to *John*. 1ſt. *George*, if he had ſurvived the teſtator, might by a fine have barred the eſtate tail. And 2dly, with the conſent of the jointreſs he might have barred the whole by a common recovery. However in fact the eſtate at *Owlerton* did deſcend and come to *John*. But it did ſo, while the jointreſs was in poſſeſſion. Was he then to loſe *Wadſley* during her life, and ſo have nothing at all in the intermediate time? Moſt certainly that could not be the intention of the teſtator. His view was plainly this: that the eſtates of *Wadſley*, and *Owlerton* ſhould not go together; but that whenever the ſecond or any other ſon ſhould become the elder by the death of his brother, or brothers, and for want of iſſue on their part, the eſtate at *Owlerton* ſhould deſcend to ſuch ſecond or other ſon, then *Wadſley* was to be a proviſion for the next brother in ſucceſſion, according to the directions of his will. But he clearly never meant that ſuch elder ſon ſhould loſe *Wadſley*, till he came into poſſeſſion of *Owlerton*.

Therefore upon the words of the will, ſtrongly ſupported by the intention of the teſtator, we are all clearly of opinion, that the

the contingency upon which the eſtate of *Wadſley* was to paſs from *John* to the plaintiffs, muſt happen upon the eſtate at *Owlerton, coming and deſcending to John in poſſeſſion.* 1775.

DENN *verſus* BURTON.

Judgment for the defendant.

PEAKE *verſus* OLDHAM in Error.

Same day.

ERROR from the Common Pleas in an action of ſlander, in which the plaintiff, now the defendant in error, declared that upon a *colloquium* of and concerning the death of one *Daniel Dolly*, the ſaid *Thomas Peake* ſaid to the ſaid *James Oldham*, "*you are a bad man, and I am thoroughly convinced* "*that you are* GUILTY, (meaning guilty of the *murder* of the "ſaid *Dolly*,) *and rather than you ſhould want a* HANGMAN, *I* "*would be your* EXECUTIONER." And being apprized that the ſaid words were actionable, and interrogated how he would prove, *what he ſaid*, anſwered, that "he would prove it by "Mrs. *Harvey*." 2. *You are a bad man, and I am thoroughly convinced that you are* GUILTY *(innuendo ut antea) and rather than you ſhould want a* HANGMAN *I would be your* EXECUTIONER. Being interrogated how he could prove the ſaid *James Oldham guilty* of the *murder* of the ſaid *D. Dolly*, he replied, "I can prove it by Mrs. *Harvey*." 3. "*You are* GUILTY," *(innuendo ut antea)* "*and I will prove it.*" 4. "*I am thoroughly* "*convinced that you are* GUILTY," (meaning guilty of the *death* of *Daniel Dolly*), *and rather than you ſhould go without a* "HANGMAN *I will* HANG *you.*" 5. "*You are* GUILTY." *innuendo* (*guilty* of the *murder* of the ſaid *Dolly*). By reaſon whereof, and to clear his character, the ſaid *James Oldham* was obliged to procure, and did procure, an inqueſt in due form of law to be taken on the body of the ſaid *Daniel Dolly*.

I am thoroughly convinced that you are guilty (innuendo of the death of D. D.) *and rather than you ſhould go without a hangman, I will hang you*, actionable.

You are guilty (innuendo of the *murder* of D. D.) held, after verdict, a ſufficient charge of *murder*, tho' the *colloquium* were only of the *death*.

Upon not guilty pleaded, the jury found a *general* verdict upon *all* the counts, with 500 *l.* damages.

The defendant firſt moved for a new trial in *C. B.* which was refuſed; and afterwards in arreſt of judgment, which rule was likewiſe diſcharged by *Gould* and *Blackſtone* Juſtices. (*Abſentib.* *De Grey* Chief Juſtice, and *Nares* Juſtice.)

Mr. *Davenport* for the plaintiff in error, objected to the 4th and 5th counts of the declaration, as containing no ſufficient ground of action. 1ſt, Becauſe the words there laid are not ſcandalous in themſelves. 2dly, Not relatively ſo, by reference

1775.

PEAKE *verſus* OLDHAM.

to any prefatory matter before ſtated: and conſequently not capable of being made ſo by any *innuendo*.

1ſt, The words, "*you are guilty*," have no determinate meaning at all, without ſpecifying ſome act or charge to which they are referable, and, therefore, moſt clearly not actionable in themſelves. 2d. The *colloquium* laid is only a *colloquium* of the *death* of *D. Dolly*, not of an untimely or violent death, or that he died by the hands of the defendant, and, therefore, cannot by an *innuendo* be extended to a charge of murder. In *Miller* verſus *Buckden*, 2 *Bulſtrode* 10, 11. ſaying of the plaintiff, "you was "the *cauſe* of the *death* of *Dowland*'s child, and I will ſwear it "on the book," were held not actionable, as being too general. So here, the charge is only general, *viz.* "*You are guilty*," without naming any crime or offence. If ſo, ſuch general charge cannot be extended by any *innuendo*. For an *innuendo* is only explanatory of ſome prefatory matter before expreſſed. 4 *Rep.* 20 *Yelv.* 21. 8. *C. Jenk. Cent.* 302. *caſe* 72. 4 *Rep.* 17.

3dly, There is no ground of ſpecial damage; for it was not compulſory on the plaintiff to have an inquiſition; nor could any expence on his part attend it; for the coroner could take nothing. Therefore, the two latter counts being clearly bad, the judgment of the *C. B.* ought to be reverſed.

Mr. *Buller* for the defendant, was ſtopped by Lord *Mansfield*, as being unneceſſary to give himſelf any trouble.

Lord MANSFIELD. It is much to be lamented, that in any ſort of action, the mere inattention or ſlip of counſel who are not always ſufficiently attentive upon what count the verdict is taken, ſhould be fatal to the party; contrary to the truth and juſtice of the caſe, the opinion of the judge upon the merits who tried the cauſe, and the meaning of the jury who pronounced the verdict. However in civil caſes the rule moſt certainly is ſettled, that where a verdict is taken *generally* and any *one* count is *bad*, it vitiates the whole. It has always ſtruck me that the rule would have been much more proper to have ſaid, that if there is any one count to ſupport the verdict, it ſhall ſtand good, notwithſtanding all the reſt are bad. In criminal caſes the rule is ſo; and one cannot, therefore, but lament that the reverſe is adopted in civil caſes; becauſe it is as it were catching juſtice in a net of form. However this conſideration will make the court lean againſt ſetting aſide a verdict upon ſuch an objection without very good reaſon, that is, without ſome apparent manifeſt defect; more eſpecially in a caſe like the preſent, where the

the words have appeared to the jury to be ſo ſcandalous as to induce them to give a verdict with 500 *l.* damages, and where that verdict has received the ſanction of the court in which the action was brought, by their refuſing to grant a new trial upon an application to them for that purpoſe. 1775. REAKE *verſus* OSBAN.

Let us conſider then, the grounds upon which the declaration in the preſent caſe is attempted to be impeached. Two of the counts are objected to, *viz.* the 4th and laſt. In the 4th it is ſaid thus, "I am thoroughly convinced that you are *guilty*;" *innuendo*, that you are guilty of the death of the ſaid *Daniel Dolly*, "and rather than you ſhould go without a hangman, I "will hang you." Upon this count it is argued, that there are many innocent ways, by which one man may occaſion the *death* of another; therefore, the words "*guilty* of the *death*," do not in themſelves *neceſſarily* import a charge of *murder*; and conſequently, as no particular act is charged which in itſelf amounts to an imputation of a crime, the words are defectively laid. What? when the defendant tells the plaintiff "he is *guilty* of "the *death* of a perſon," is not that a charge and imputation of a very foul and heinous kind? Saying that ſuch a one is the *cauſe* of another's *death*, as in the caſe in 2 *Bulſtr.* 10, 11. is very different; becauſe a phyſician may be the *cauſe* of a man's *death*, and very innocently ſo; but the word "*guilty*," implies a malicious intent, and can be applied only to ſomething which is univerſally allowed to be a crime. But the defendant does not reſt here: on the contrary, in order to explain his meaning he goes on and ſays, "and rather than you ſhould be without "a hangman, I will hang you." Theſe words plainly ſhew what ſpecies of death the defendant meant, and, therefore, in themſelves manifeſtly import a charge of murder.

The *innuendo* to the words of the next count is, that they mean "*guilty* of the *murder* of *Daniel Dolly*," and the jury by their verdict have found the fact; namely, that ſuch was the meaning of the defendant. But that is not all; for the jury find a ſpecial damage ſuſtained by the plaintiff in being obliged, in conſequence of the charge ſo made by the defendant, to have an inqueſt taken on the body of the deceaſed.

What? After a verdict, ſhall the court be gueſſing and inventing a mode, in which it might be barely poſſible for theſe words to have been ſpoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are *defectively* laid,

1775. PEAKE *verſus* OLDHAM.

a verdict will not cure them. But where, from their general import, they appear to have been ſpoken with a view to defame a party, the court ought not to be induſtrious in putting a conſtruction upon them, different from what they bear in the common acceptation and meaning of them.

I am furniſhed with a caſe founded in ſtrong ſenſe and reaſon in ſupport of this opinion; the name of it is *Ward* v. *Reynolds*, *Paſ.* 12. *Ann. B. R.* and it is as follows: The defendant ſaid to the plaintiff, "I know you very well; how did your huſband "die?" The plaintiff anſwered, "as you may, if it pleaſe "God." The defendant replied, "no; he died of a wound "you gave him." On not guilty, there was a verdict for the plaintiff; and on a motion in arreſt of judgment, the court held the words actionable; becauſe, *from the whole frame of them, they were ſpoken by way of imputation.* And Lord Chief Juſtice *Parker* ſaid, "It is very odd, that after a verdict a court of juſtice ſhould "be trying whether there may not be a poſſible caſe in which "words ſpoken, by way of ſcandal, might not be innocently ſaid. "Whereas, if that were in truth the caſe, the defendant might "have juſtified, or the verdict would have been otherwiſe." So here, if ſhewn to be innocently ſpoken, the jury might have found a verdict for the defendant; but they have put a contrary conſtruction upon the words as laid, and upon the laſt count have found that the defendant meant a charge of murder: Therefore I am of opinion that the judgment of *C. B.* muſt be affirmed.

Aſton, *Willes*, and *Aſhhurſt*, Juſtices, of the ſame opinion.

Judgment affirmed.

Same day.

CHAPMAN ex dim. STAVERTON, *verſus* EMERY.

One, *after* marriage, makes a ſettlement of certain premiſes upon himſelf for life, remainder to his *wife* for life, remainder to their iſſue in tail;

IN ejectment, a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following caſe:

By indentures of leaſe and releaſe the 3d and 4th of *October*, 1769, between *Richard Emery*, and the defendant *Mary* his wife on the one part, and *Deodatus Staverton* of the other part, the ſaid *Richard Emery* made a mortgage in fee of the premiſes in queſtion to the ſaid *Deodatus Staverton*, for ſecuring the payment of 750 *l.* by annual inſtalments, the laſt of which was to be made on the 4th of *October*, 1776, with a covenant to levy a fine to the

and *three* years afterwards *mortgages* the premiſes to *B.* who was told there was ſuch ſettlement. The ſettlement is a *voluntary* conveyance within the ſtatute 27 *El.* c. 4.

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uſe of the ſaid *Deodatus Staverton*; but no fine was levied, nor were the ſaid indentures of leaſe and releaſe ever executed by the defendant *Mary*. That *Deodatus Staverton* died *January* 13th, 1771, leaving the leſſor of the plaintiff his heir at law. 1775. CHAPMAN *verſus* EMERY.

That by indentures of leaſe and releaſe, 28th and 29th *March*, 1766, between the ſaid *Richard Emery* and *Mary* his wife of the one part, and *Thomas Plumber* and *Joſeph Turner* of the other part; the ſaid *Richard Emery* in *conſideration* of *ten ſhillings*, and for divers other good cauſes and conſiderations conveyed the ſaid premiſes to the ſaid *Thomas Plummer* and *Joſeph Turner in truſt* for the ſaid *Richard Emery* for life, remainder to his wife for life, remainder to the iſſue of the ſaid *Richard Emery*, and *Mary* his wife in tail; and in default of iſſue, remainder to the right heirs of the ſaid *Richard Emery* in fee, which ſaid indentures were executed by all the parties thereto.

It was proved that the above 750*l.* was part of a ſum of 1,200*l.* agreed, by the ſaid *Richard Emery*, to be paid to the ſaid *Staverton* for the place of carver to the lord mayor of *London*; and that while the negotiation for the purchaſe of the ſaid place was carrying on, the ſaid *Deodatus Staverton*, and alſo the leſſor, were adviſed by *Thomas Gates*, that the ſaid *Deodatus Staverton* ought to be careful in what he was about; for that he the ſaid *Gates* believed that *Richard Emery* had made a ſettlement of the eſtate intended to be mortgaged, upon his wife and children; for that *Emery*'s wife had told him the eſtate was ſettled upon her and her children: that the ſaid *Richard Emery* denied having made ſuch ſettlement, but the negotiation for the purchaſe of the ſaid place was ſtopped twice or thrice on that account.

It was alſo proved, that the ſaid *Deodatus Staverton*, who was in a declining ſtate of health, had, during the negotiation for the purchaſe of the ſaid place, frequently declared that he would not ſell his ſaid place to any perſon except the ſaid *Richard Emery*: that as the ſaid *Deodatus Staverton* grew worſe and worſe in his health, he was glad to take the ſecurity as it was, and ſo the firſt mentioned indentures were executed.

The queſtion was, Whether, under the circumſtances of this caſe, the leſſor of the plaintiff is entitled to recover the premiſes in queſtion?

Mr. *Whitchurch* for the plaintiff ſtated the queſtion to be, Whether the leaſe and releaſe of the 28th and 29th of *March*, 1766, were not a voluntary conveyance, within the ſtatute 27 *El.*

1775.

CHAPMAN *verſus* EMERY.

c. 4. and, therefore, void as againſt the mortgagee, under whom the leſſor of the plaintiff claimed? He inſiſted it was; that the ſtatute had always received a liberal conſtruction, and cited 3 *Rep.* 82, *Twine's* caſe. *Moore*, 615. *Cro. El.* 444. 2 *Vef.* 1. 2*dly*. That the notice found made no difference. 5 *Rep.* 60. *b.* Caſes in *Canc. temp.* Lord *King*, 65.

Serjeant *Sayer* for the defendant *contra*, inſiſted, that the *Stat.* 27 *Eli. c.* 4. related only to purchaſers; and that a mortgagee was not a *purchaſer* within the ſtat. 27 *El. c.* 4. The purchaſers there ſpecified are purchaſers in *fee-ſimple*, *fee-tail*, *for life* or *years*, and muſt be either abſolute or conditional purchaſers. But a mortgagee can hold the eſtate only till the debt is paid: therefore not a purchaſer within the meaning of the ſtatute. But ſuppoſing he was, yet here, the wife did not join, nor was any fine levied. 2*dly*, The mortgagee in this caſe had full and ſufficient notice, and no pretence or circumſtance of fraud appears; on the contrary, the ſettlement was three years prior to the mortgage; therefore, could not have been made with a view to defeat it. He cited *Townſend* v. *Windham*, 2 *Vez.* 10. where Lord *Hardwicke* ſaid, "If there is a voluntary conveyance of a real eſtate or chat-"tel intereſt, by one not indebted at the time; if ſuch voluntary "conveyance be for a child, and no particular evidence or badge "of fraud to deceive ſubſequent creditors, it will be good, "though the party afterwards become indebted."

Lord MANSFIELD.—I rather doubt Lord *Hardwicke's* ſaying that, Where a woman about to marry a ſecond huſband, makes a ſettlement of her eſtate upon the children by her firſt huſband, ſuch ſettlement has been held good.

Serjeant *Sayer* then ſuggeſted, that in fact the defendant had in conſideration of this ſettlement given up her intereſt in 1,470*l.* *South-ſea* annuities for her life. But Mr. Juſtice *Willes* who tried the cauſe, ſaid, there was no evidence of it at the trial.

Lord MANSFIELD.—That would have been a very material part of the caſe; and if upon inquiry the fact ſhould turn out to be really ſo, you may move for a new trial. But upon the caſe, as ſtated at preſent, no ſuch fact appears; and there is no doubt but a mortgagee is a purchaſer.

**Vide* 5 *Rep.* 60 *S P.* adjudged. 1 *Eq. Caſ. Abr.* 334. *Tomlins* v. *Ennis.*

As to the point of notice, it is held that notice makes no difference, becauſe it is of a conveyance made void by the ſtatute*.

Suſpend the delivery of the *poſtea* for a few days, to ſee if you have any evidence that can couple the wife's giving up her annuity with the ſettlement made upon her and her children; ſo

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as to shew it was not a mere voluntary settlement, but made upon a sufficient consideration. 1775.

N. B. No such evidence was supplied, nor any further application made to the court afterwards.

CHAPMAN *versus* EMERY.

FELL *versus* RILEY.

Saturday, May 20th.

IT was decided in this case, that the rule of *Easter* term, 15 *Car.* 2. which provides, "That no warrant of attorney "for confessing a judgment executed by any person in custody, "shall be of any force, unless some attorney, for and on behalf "of such person in custody, and expressly named by him, be pre- "sent, to inform him of the nature of such warrant," *&c.* does not extend to cases where the defendant is in custody upon an *execution;* but only to cases where he is in custody upon *mesne process.* The court said, the reason of the distinction was this; that where a man is arrested upon *mesne process*, the debt is not liquidated; and, therefore, under duress he may be prevailed upon to confess more than is really due. But upon an execution the debt is liquidated, and, therefore, the only purpose of the defendant giving a warrant of attorney in such case is to procure his liberty. If indeed it could be shewn that a party, even in execution, had been prevailed upon to acknowledge a judgment for more money than was really due, the court would give relief under the circumstances. Because cases of fraud and imposition are exceptions to all rules whatsoever. But in the present case, the court observed there were no such circumstances, and therefore discharged the rule for setting aside the judgment entered up on the warrant of attorney.

Warrant of attorney to confess a judgment by one in *custody* under an *execution* is good, though no attorney be present on his behalf at the time of its being executed. *Vide* 2 *Str.* 1145.

BROWN *versus* BERKELEY.

Tuesday, May 23d.

THE plaintiff declared in an action of covenant upon certain articles of agreement for the sum of 20*l.* laid between the plaintiff and the defendant, that the defendant did not, within one month from the date of the agreement, find a man who should carry on foot twenty-four stone weight ten miles within fifteen hours time. To this declaration the defendant demurred.

A *foot-race* is a game within the *stat.* 9. *Ann. c.* 14.

Mr.

1775.

BROWN *verſus* BERKELEY.

Mr. *Buller*, in ſupport of the demurrer, inſiſted that this was a wager within the *ſtat.* 9 *Ann. c.* 14. and therefore void. For though the *ſtat.* 9 *Ann.* does not enumerate the different ſpecies of gaming mentioned in the *ſtat.* 16 *Car.* 2. *c.* 7.; yet it plainly has reference to, and includes them all under the general words, "*other game or games.*" Therefore in *Goodburn* v. *Marley*, *Str.* 1,159. *horſe racing* was adjudged to be within the *ſtat.* 9 *Ann. c.* 14. though not particularly mentioned in it. If ſo, it muſt alſo extend to *foot races*, for both are expreſsly named in the *ſtat. Car.* 2.

The only remaining queſtion then is, Whether this being a race againſt *time*, and by *one* perſon alone, makes any difference? With reſpect to which he cited *Lynall* v. *Longbottom.* 2 *Wilſ.* 36. where it was admitted by counſel, that a *foot race* was within the *ſtat.* 9 *Ann. c.* 14. and adjudged by the court, that as one horſe ſtarting alone, was a horſe race, ſo one perſon running alone, was a foot race.

Mr. *Davenport*, *contra*, contended that, at common law, all games were lawful; and, therefore, if this contract was void, it muſt be made ſo by ſome particular ſtatute. It has never been decided that *all* wagers, upon every event or contingency whatever, are within the ſtatute of gaming. Wagers depending on play are not within the ſtatute, and cited 1 *Salk.* 344. *Pope* v. *St. Leger*, *Jones* v. *Randall*, *ſupra*, 37. Earl of *March* v. *Pigot*, 5 *Burr.* 2,802.

But it is ſaid, that a foot race is expreſsly prohibited by *ſtat.* 16 *Car.* 2. and that *ſtat.* 9 *Ann. c.* 14. clearly has reference to it; and, therefore, though a foot race is not particularly mentioned in this latter ſtatute, it is nevertheleſs included under the general words, "*other game or games.*" If ſo, there needed no act of parliament againſt gaming or wagering policies, where there is no intereſt, nor againſt many other games ſince prohibited. The ſtatute ought expreſsly to have prohibited this ſpecies of contract, and not having done ſo, it remains, as it would have been at common law, a valid and good contract.

The court took time to conſider. Afterwards, on *Monday May* 29th, Lord *Mansfield* delivered the opinion of the court as follows:

We took time to ſee if we could diſtinguiſh this caſe from *Lynall* v. *Longbottom*, 2 *Wilſ.* 36. cited in the argument. We think there is no difference between them; and, therefore, there muſt be judgment for the defendant.

Judgment for the defendant.

REX *verſus* Dutcheſs of KINGSTON.

Same day.

MR. *Wallace* had moved * on the part of the defendant, for a *certiorari* to be directed to the juſtices of *oyer* and *terminer*, at *Hicks's-hall*, to remove into this court an indictment found againſt her, at the ſeſſions there, for *bigamy*; and, upon the motion the court granted the writ.

* *May* 18th. A *certiorari* does not lie to remove an indictment for *felony* from the general ſeſſions of oyer and terminer, at *Hicks's-hall*, without the conſent of the proſecutor.

But now Lord *Mansfield* took notice to Mr. *Wallace*, that the motion was irregular. For a defendant has no right to remove an indictment of felony from *Hicks's-hall*, without the conſent of the proſecutor; and in this caſe there was no conſent, therefore his lordſhip ſaid the writ iſſued *improvidé*, and muſt be ſuperſeded.

Mr. *Wallace* ſaid, the only object of removing the indictment was for the purpoſe of her being bailed: but *per* Lord *Mansfield*, the purpoſe for which it was intended, makes no difference.—The next day Mr. *Wallace* moved for a *habeas corpus*, Mr. Juſtice *Aſton* having granted a warrant for her apprehenſion (as had been ſettled amongſt the parties, as the propereſt method to be taken) upon a certificate of the indictment being found.

The warrant and the return to it were read; and then Mr. *Wallace* moved to bail her. He mentioned the ſuit in the ſpiritual court, upon the proceedings there againſt Mr. *Hervey*, for jactitation of marriage, and alſo the proceedings in Chancery relating to her marriage; all theſe proceedings were put into court, and entered as read. He obſerved, that ſhe muſt, at all events, be tried by her peers, as Mr. *Hervey* was now become Earl of *Briſtol*.

Mr. *Bearcroft*, for the proſecutor, conſented to her being bailed, as there could be no doubt (he ſaid) of her appearance to anſwer the indictment.

Lord MANSFIELD.—Though we ſhould undoubtedly have bailed her, it is better to take it as upon the conſent of the proſecutor; and ſhe muſt be bound to appear in the Houſe of Lords when required, to anſwer to the indictment, as well as to appear in this court. But as there is nothing againſt her in this court, her appearance here may be diſpenſed with for the future upon motion without giving her the trouble of actually appearing here in court any more.

Bail

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Bail was taken accordingly, herſelf being bound in 4,000*l.* and each of her four bail in 1,000 *l.**

REX *verſus* DUTCHESS of KINGSTON.

ATKINS & UXOR *verſus* HILL.

Aſſumpſit lies upon a *promiſe* by an executor to pay a *legacy* in conſideration of *aſſets*.

IN *aſſumpſit* the plaintiffs declared againſt *Charles Hill*, being in the cuſtody, *&c.* for that, Whereas *James Clarke*, *&c.* by his laſt will, *&c.* did give and bequeath to the plaintiff's wife, the ſum of 60 *l.* *&c.* and of his laſt will and teſtament, made the ſaid *Charles Hill ſole executor*, *&c.* and the ſaid *Charles Hill* took upon himſelf the burthen and execution of the ſaid will. And the ſaid *N.* and *A.* further ſay, that divers *goods* and *chattels*, &c. afterwards, *&c.* came to the hands of the ſaid *Charles Hill, as executor* of the ſaid *J. C.* which ſaid goods and chattels were *more than ſufficient* to ſatisfy and *pay all the juſt debts and legacies* of the ſaid *J. C.* *&c.* of which the ſaid *C. H. then and there had notice. By reaſon of which* ſaid premiſes, the ſaid *Charles Hill became liable* to pay to the ſaid *N.* and *A.* the ſaid ſum of 60 *l.* and *being ſo liable*, he the ſaid *C. in conſideration thereof*, afterwards, *&c.* undertook and faithfully *promiſed* to pay to them the ſaid ſum of 60 *l.* whenever, *&c.*

To this declaration the defendant demurred generally.

Mr. *Le Blanc* in ſupport of the demurrer, objected, 1ſt, That the declaration was bad upon a general ground; namely, *that no action on the caſe lies for a legacy iſſuing out of perſonalty.* Legacies

* The recognizance was as follows.—*England.* Dutcheſs Dowager of *Kingſton*, who ſtands indicted by the name of *Elizabeth*, the wife of *Auguſtus John Hervey*, Eſq; is delivered to bail, upon a writ of *habeas corpus ad ſubjiciendum*, for her appearance in the court of our ſovereign lord the king, before the king himſelf at *Weſtminſter*, on the firſt day of the next term, and ſo from day to day, until ſhe ſhall be diſcharged by the ſaid court, and not to depart the ſaid court without leave; and alſo for her appearance before our ſaid lord the king in parliament, to anſwer to an indictment againſt her for felony, whenever ſhe ſhall be thereunto required.

By the Court. BURROW.

I have inſerted this recognizance, *verbatim*, becauſe there was found only a ſingle inſtance of the like, (*viz.* of a recognizance taken in this court to appear in parliament) which was that of the Earl of *Orrery*, taken and acknowledged before Lord Chief Juſtice *Pratt*, on the 14th *March*, 9 *Geo.* 1. for his appearance in the court of our lord the king, before the king himſelf at *Weſtminſter*, on the firſt day of next term, and ſo from day to day until he ſhall be diſcharged by the ſaid court. and not to depart that court without leave, to anſwer to thoſe things which, on the behalf of our ſaid lord the king ſhall be objected againſt him; and alſo for his appearance from time to time, until he the ſaid *Charles* Lord *Orrery* ſhall be diſcharged by due courſe of law, before our lord the king in parliament, whenever by our ſaid lord the king he ſhall be thereunto required, to anſwer to thoſe things, which on behalf of our ſaid lord the king ſhall be there objected againſt him.

are

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are cognizable only in the *ſpiritual courts*, which have a peculiar and *excluſive* juriſdiction of teſtamentary matters. This is expreſsly laid down in the caſe of *Nicholſon* v. *Shearman*. Sir *Thomas Raym.* 23. *Sid.* 45. *S. C.* It is true, that in the report of this caſe by *Sid. Twiſden* juſtice is made to ſay, "That in his time "it had been adjudged, that an action on the caſe lay for a lega- "cy *payable out of land.*" This doctrine of the excluſive juriſdiction of the eccleſiaſtical courts in caſes of legacies, is further eſtabliſhed in *Dyer* 264. *pl.* 41. 11 *Mod.* 145. Archbiſhop of *Canterbury* v. *Willett.* 1 *Salk.* 315. *S. C. Moore* 917. *Lloyd* v. *Madox.*

But further, this court will not hold plea in any caſe where it cannot do ſubſtantial juſtice between the parties. Now it is a ſettled rule, upon a ſuit inſtituted in the ſpiritual court, againſt an executor for a legacy; that the legatee ſhall give ſecurity to refund, in caſe of ſubſequent debts; or a prohibition will lie. *Knight* verſus *Clarke*, cited in 1 *Vern.* 93, 4. And if an executor were to pay without ſuch ſecurity, it would be a *devaſtavit.* Therefore, if an action could be maintained in this court, he muſt at all events, in caſe of future debts, be liable *de bonis propriis*, which would be the greateſt injuſtice: for he has no poſſible means here of compelling ſuch ſecurity, nor can the court oblige the legatee to refund.

Objection 2. Before a legatee can entitle himſelf to a remedy againſt the executor, it muſt be ſhewn that he has received aſſets ſufficient to anſwer all demands of a higher nature. In this caſe the declaration only avers, that more is come to the defendant's hands than is ſufficient to pay the teſtator's debts and legacies. But *funeral expences* are to be firſt paid, about which the declaration is totally ſilent. Therefore, for want of a ſufficient averment, as to this point, the declaration is alſo bad, and judgment ought to go for the defendant.

Mr. *Buller contra*, for the plaintiff. Not a ſingle common law caſe has been adduced to ſhew that this action will not lie: nor has any ſufficient reaſon been aſſigned, why the temporal courts ſhould not take cognizance of legacies, as well as the eccleſiaſtical courts. The only reaſon attempted to be given in any of the books, is a *dictum* in *Perkins. ſect.* 486. namely, "That "it is to be intended ſpiritual men, have better conſciencies than "laymen," *&c.* But this is clearly founded on the ſuperſtition of the times. On the other hand, the opinion of *Twiſden* juſtice, in *Nicholſon* v. *Shearman*, 1 *Sid.* 46. goes ſtrongly to ſhew, that the common law courts did originally hold plea in caſes of legacy.

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legacy. He expreſsly ſays, "Teſtamentary cauſes did not originally belong to the ſpiritual courts, but to the temporal courts and common law; and were proved before lords of manors, as they ſtill are in ſome places. And there are many precedents in the books, eſpecially in the old books of entries, where actions on the caſe, and actions of debt, were brought for legacies in the hundred court." He is ſupported in this opinion by 9 *Co.* 37. *b.* 2 *Roll. Abr.* 217. Year-book. *Hil.* 11. *H.* 7. 12. *B.* Indeed, in *Nicholſon* v. *Shearman*, the other judges agreed, that during the time of the troubles, the temporal courts alone had cognizance of legatary matters. It is clear, therefore, from all theſe authorities, that the common law courts *once* had juriſdiction. If ſo, ſuch juriſdiction could only be taken away by an act of parliament expreſsly for the purpoſe. For it is a general principle, that wherever an action could be maintained at common law, it ſtill remains, unleſs expreſsly taken away by ſtatute. But no ſuch ſtatute exiſts; and the weight of authorities is the other way. As to the caſe of *Nicholſon* v. *Shearman*, the ground of that determination was, not that an action at common law would not lie, but that there it was a *truſt*, and the breach of it a *tort*, which dies with the perſon. The authorities in favour of the action are, *Raſtall's Entries*, 301. *a.* and *b.* "Declaration in debt againſt executors by a legatee of the third part of the teſtator's goods, where the *quantum* had been aſcertained by the ordinary." *Style* 55. where it is expreſsly ſaid, "an action will lie for a legacy." 2 *Lev.* 3. *Davis* v. *Rayner*, which was *aſſumpſit* in conſideration of "*forbearance* of a legacy," and held good, though *no aſſets*. *A fortiori*, an action could have been maintained for the legacy itſelf; otherwiſe forbearance would have been no conſideration. *Sid.* 21. *Butler* v. *Butler*.

The next queſtion is, Whether the facts ſtated in this declaration, namely, that the defendant was executrix, and had *aſſets*, &c. are a ſufficient conſideration for a promiſe. As to that queſtion, it is a ſettled point, that wherever an expreſs promiſe is made upon good conſideration, an action lies: And the ſlighteſt ground is ſufficient to maintain a promiſe. 1 *Vent.* 40, 41. *Wells* v. *Wells*, 1 *Lev.* 273. *S. C.* *Stone* v. *Withipool*. *Latch.* 21. in which latter caſe it is laid down, "That it is an uſual allegation for a rule, that any thing which is a ground for equity is a ſufficient conſideration."

But

But here an expreſs promiſe is made, and by the demurrer admitted. It is objected, however, that there is no averment that the funeral expences are paid. The anſwer is, it is averred that he *had aſſets to pay*, which is alone ſufficient, and ſo it was expreſsly held by Lord *King*, in the caſe of *Camden* v. *Turner*, Sittings after *Tr.* 5 *Geo.* 1. *C. B.* Select caſes of evidence by Sir *John Strange*. 1775. ATKINS *verſus* HILL.

Lord MANSFIELD.—The argument in ſupport of this demurrer, has proceeded upon ſuppoſing a *general* queſtion, which is not at all involved in this caſe; and agitating that general queſtion, as if this were a declaration upon the ground of the will only, and nothing elſe. If it were a general queſtion, I ſhould not immediately give my opinion. The objection, however, that is taken upon the ſuppoſition of its being ſo, is, that a legacy, ariſing out of a will of perſonal eſtate, being a teſtamentary matter, the cognizance of it belongs peculiarly and *excluſively* to the eccleſiaſtical court; and conſequently, that the courts of common law have no juriſdiction. If that propoſition were true, the objection would hold equally againſt the juriſdiction of the courts of equity. For it is plain, that where the cognizance of any matter is the peculiar province of a particular *forum*, all other courts are excluded. For inſtance, a court of equity can no more try the validity of a will of perſonal eſtate, or the validity of a marriage, than this court. The judge of the admiralty has cognizance of the queſtion of prize. A court of equity is as much excluded as a court of law; and many other inſtances might be put.

It is objected, that this court cannot compel a legatee to refund, if debts ſhould appear. In that caſe, he would be liable to refund, whether he gave ſecurity or not. For it would be the caſe of payment upon a miſtaken ground. But if juſtice required it, this court would make the plaintiff's giving an indemnity, a condition of his recovering. There are many caſes where this court has made parties give indemnity.

It is true, that the law concerning legacies was made in the eccleſiaſtical court. The authority of the Roman law was received. The opinions of doctors and foreign authors upon the civil law, were quoted and reſpected.

When the courts of equity held plea of legacies, as *incident* to *diſcovery* and *account*, they adopted the whole ſyſtem by which legacies were governed in the eccleſiaſtical court. In like manner the courts of law, in the exerciſe of a concurrent juriſdiction, would adopt the ſame rules.

But

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But a legatee who ſues at law, muſt clearly prove that the defendant has received aſſets, which cannot be done, except in a caſe ſo clear as not to admit of litigation. In this reſpect, the *diſcovery* and *account* given in a court of equity is ſo preferable a remedy, that it has drawn all ſuch ſuitors thither: and therefore, in fact, there is ſcarce an inſtance of a legatee attempting to ſue at law. In clear caſes the legacies are paid; in doubtful, the relief given by a court of equity, is eaſier and better. But upon *principles*, if the queſtion is *conſtitutionally appropriated* to the eccleſiaſtical juriſdiction, it muſt equally exclude the courts of equity as well as law. I have mentioned thus much by way of obſervation upon the objection that has been made, as ſuppoſing this a caſe within the general queſtion; which, however, as I ſaid before, it is not.

This is a caſe in which the declaration particularly ſtates, that aſſets have been received by the defendant, the executor, more than ſufficient to pay all the teſtator's debts and legacies. If ſo, it muſt undoubtedly muſt be taken upon the pleadings, that there was ſufficient to diſcharge the funeral expences, becauſe they are payable firſt; conſequently, if there was leſs than the amount of them, there could not be ſufficient to diſcharge the debts and legacies. The declaration then goes on to ſtate, that in *conſideration* of there being full *ſufficient aſſets* as aforeſaid, the defendant undertook and promiſed to pay the plaintiff his legacy. No doubt then, but at any time after an executor has *aſſented*, the property *veſts*; and if it be a pecuniary legacy, an action at law will lie for the recovery of it. Formerly, upon a bill being filed in *Chancery* againſt an executor, one part of the prayer of it was, that he ſhould *aſſent* to the bequeſt in his teſtator's will. If he had aſſets, he was bound to aſſent: And when he had aſſented, the legacy became a demand which in law and conſcience he was liable to pay. But in the preſent caſe there is not only an *aſſent* to the legacy, but an *actual promiſe* and undertaking to pay it: and that promiſe founded on a good conſideration in law; as appears from the caſes cited by Mr. *Buller*, particularly the caſe of *Camden v. Turner*,* where acknowledgment by an executor, "that he "had enough to pay," was held a ſufficient ground to ſupport an *aſſumpſit*. Here the defendant by his demurrer admits he had ſufficient to pay: therefore, this is not the caſe that Mr. *Le Blanc* has been arguing upon; but it is the caſe of a promiſe made upon a good and valuable conſideration, which in all caſes is a ſufficient ground to ſupport an action. It is ſo in caſes of obligations, which

* Sittings after *Trinity* term. 5 *Geo.* 1. *C. B. coram King. C. J.*

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which would otherwiſe only bind a man's conſcience, and which, without ſuch promiſe, he could not be compelled to pay. For inſtance, where an infant contracts debts during his minority; if after he comes of age he conſents to pay them, an action lies: So a conveyance executed by an infant, which he was compellable to do by equity, is a good conveyance at law. *Co. Lit. Attornment.* 315. *a.* In this caſe the promiſe is grounded upon a reaſonable and conſcientious conſideration; namely, that the defendant had aſſets to diſcharge the legacy. If ſo, he was compellable in a court of equity, or in the eccleſiaſtical court, to pay it. I give my opinion upon this caſe as it ſtands; that is, that it is an expreſs promiſe made upon a good and ſufficient conſideration. *Vide* the next caſe.

The three other judges concurred.

Per Cur. Judgment for the plaintiff.

Mr. *Le Blanc* than moved for liberty to withdraw the demurrer, and plead the general iſſue, but the court refuſed it.

HAWKES & UXOR *verſus* SAUNDERS *.

Hilary term, 22 *Geo.* 3.

Monday, *Jan.* 20th. 1782.

Aſſumpſit lies againſt an executrix for a *legacy*, upon a *promiſe* in conſideration of *aſſets*.

THIS action was brought againſt the defendant in her *own right*; and the declaration ſtated, that *George Saunders*, by his will bequeathed a legacy of 50 *l.* to the plaintiff; that he appointed the defendant his executrix; that ſhe proved the will; that *goods* and *chattels* came to her hands *more than ſufficient to pay all the teſtator's debts and legacies*, by reaſon whereof ſhe became *liable* to pay the legacy, and being ſo liable, *in conſideration thereof* ſhe promiſed to pay it.

Lord MANSFIELD. This caſe does not at all involve in it the queſtion, whether a legatee has a *general* right to ſue for a legacy in this court.

But, if the action be brought againſt her *perſonally* in her *own right*; the judgment can only be *de bonis propriis*.

Two objections have been made; 1*ſt*, That there can be no judgment in this caſe *de bonis teſtatoris*; becauſe the action is not brought againſt the defendant as *executrix eo nomine*; but is a *perſonal* demand againſt her *generally* in her *own right*. As to that, we are of opinion the objection is good; for the demand is certainly a *perſonal* demand againſt the defendant, in conſequence of a promiſe made by her, ſhe being executrix.

It is admitted at the bar, that *after verdict*, it muſt be taken to have been a promiſe *in writing*, and that there were *aſſets*. If

* I have inſerted this caſe out of the order of time, for the purpoſe of bringing the general doctrine upon the ſame ſubject under one point of view.

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so, the whole case is reduced to this single point: Whether the circumstance of the defendant having assets sufficient to pay all the debts and legacies, is, or is not a sufficient consideration for her to make a promise to pay the legacy in question? As to that point, the rule laid down at the bar, as to what is or is not a good consideration in law, goes upon a very narrow ground indeed; namely, that to make a consideration to support an *assumpsit*, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. I cannot agree to that being the only ground of consideration sufficient to raise an *assumpsit*.

Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori*, a legal or equitable *duty* is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can inforce, and *promises*, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations: Or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessaries; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing, by the statute of frauds.

In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration. But an executor who has received assets, is under every kind of obligation to pay a legacy. He receives the money by virtue of an office which he swears to execute duly. He receives the money as a trust or deposit, to the use of the legatee. He ought to assent if he has assets. He has no discretion or election. He retains what belongs to the legatee, and therefore, owes him to the amount.

An account of assets, or a judgment to pay out of assets, is only necessary when the sufficiency of assets is uncertain. Where the sufficiency of assets received is certain, the executor's duty to pay a legatee, follows by necessary consequence.

The legacy, in such a case, is a demand clearly due from the executor upon various grounds of natural and civil justice, and may

may be recovered from him by proceſs of law. In ſuch a caſe a promiſe to pay ſtands upon the ſtrongeſt conſideration. 1775.

HAWKES, *verſus* SAUNDERS.

Let us ſee then what the facts are in the preſent caſe. The executrix knows the ſtate of her teſtator's affairs, and of his property. It might conſiſt of chattels which ſhe might not chuſe to diſpoſe of. It might conſiſt of leaſes which ſhe had no mind to ſell; and having a *full fund* to pay the demand, which the plaintiff had a right to recover if he pleaſed, ſhe, in *conſideration of that fund*, promiſes to pay. I cannot think that this is *not* a ſufficient conſideration. I am of opinion it is amply ſufficient. It is not like the caſe of *Rann* verſus *Hughes*; for there, there were no aſſets, nor any averment of aſſets ſtated in the declaration. But in this caſe there was a full fund; and therefore ſhe was bound in law, juſtice, and conſcience, to pay the plaintiff his legacy.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

BULLER juſtice. I am entirely of the ſame opinion. That an action in the courts of *Weſtminſter-hall*, will, under *ſome circumſtances*, lie for a legacy, is a queſtion which I think can never admit of any ſerious doubt: For there are a number of caſes in the books, from the time of *Henry* VI. to the preſent time, which prove, that under different circumſtances, ſuch action may be maintained. I think there is as little doubt, but that the circumſtances of the preſent caſe, as proved at the trial, were ſufficient to ſuſtain an action; for the legacy was to be paid out of land; and there was an *expreſs aſſent* by the executrix to the legacy. But the evidence which was given at the trial, is not now before the court: We are to decide this caſe upon the face of the record alone.

The plaintiff in his declaration has not ſtated that the legacy was payable out of land; neither has he ſtated any aſſent by the executrix.

The action is brought againſt the defendant in *her own right*; and the declaration is ſimply, that *George Saunders*, by his will bequeathed a legacy to the plaintiff, and made the defendant executrix: That ſhe proved the will, and had *aſſets* ſufficient to pay all the debts and legacies; and by reaſon thereof ſhe became liable to pay the legacy, and being ſo liable, ſhe promiſed to pay it.

To this declaration, two objections have been made in arreſt of judgment. 1*ſt*, That the defendant is not ſufficiently de-

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ſcribed as executrix, and, therefore, there cannot be judgment *de bonis teſtatoris*. 2*dly*, No judgment can be entered *de bonis propriis*; becauſe there was no conſideration for the promiſe; and therefore it is *nudum pactum*.

As to the firſt, I am of opinion, that the plaintiff cannot upon this declaration take judgment *de bonis teſtatoris*. The action is brought againſt the defendant in her *own right*, and *not* as *executrix*. It charges her with a *perſonal* promiſe to pay the legacy, and not upon a *qualified* promiſe to pay as *executrix*, or out of aſſets. And the plaintiff having by his declaration made a perſonal demand againſt her; he muſt ſtand or fall by that, and cannot now reſort to any demand that he may have upon her in the particular character of the executrix.

The forms of pleading are very different where a perſon is charged as executrix, and where ſhe is charged perſonally. In the firſt caſe, ſhe is always named *as executrix* in the beginning of the declaration: She is afterwards ſtated to be liable as *executrix*; and the promiſe alleged to have been made by her *as executrix*. But in the other caſe, ſhe is charged *generally* as any other perſon, and a *general* charge is a *perſonal* charge.

This caſe, therefore, depends wholly upon the ſecond queſtion; whether there be a ſufficient conſideration alleged for the promiſe; or whether the defendant's promiſe be merely *nudum pactum* and void.

The conſideration ſtated for the promiſe is, that the defendant was executrix, and that ſhe had received aſſets more than ſufficient to pay all the debts and legacies. The queſtion is, Whether that be not a ſufficient conſideration?

Under thoſe circumſtances, if there had been *no promiſe*, nor even an *aſſent* to the legacy the defendant might have been *compelled* in a court of equity, or in the eccleſiaſtical court, to have paid it. Whether *without aſſent* ſhe could be compelled in a *court of law*, to pay it or not, is a queſtion which it is not neceſſary to give any opinion upon now; and, therefore, though I have endeavoured to trace out the juriſdiction and the authority of the eccleſiaſtical court from the earlieſt times, and though there is great reaſon to ſuppoſe that the juriſdiction which that court now poſſeſſes in matters of legacy, was originally got by uſurpation on the temporal courts; and though there is a wide difference between allowing to the eccleſiaſtical court a juriſdiction in ſuch matters, and ſaying it ſhall have that juriſdiction excluſive of all other courts; I purpoſely avoid giving any opinion, or even hinting

hinting what would be the result of my researches where there is no promise or assent. 1775.

HAWKES *versus* SAUNDERS.

I shall give my opinion singly on this point; Whether an obligation in justice, equity, and conscience, to pay a sum of money, be, or be not, a sufficient consideration in point of law, to support a promise to pay that sum?

If such a question were stripped of all authorities, it would be resolved by inquiring whether *law* were a *rule of justice*, or whether it were something that acts in direct contradiction to justice, conscience, and equity. But the matter has been repeatedly decided.

In *Stone* versus *Withypool*, *Latch.* 21. the court say, "It is an "usual allegation for a rule, that *every* thing which is a *ground* "for *equity*, is a sufficient consideration." So in *Wells* versus *Wells*. 1 *Vent.* 41. the court *presumed* an equitable right in the plaintiff, which did not appear on the declaration; and held, that to debar herself of that, was a good consideration.

These authorities alone are sufficient to shew, that the ground taken in the argument at the bar is not large enough.

But to come closer to the consideration now in question, in *Camden* versus *Turner*. *C. B.* Sittings after *Trin.* 5 *Geo.* 1. *King C. J.* held, that an action *for money had and received*, lay against an executor for a legacy, which he had *owned lay ready for the plaintiff, whenever he would call for it.* In that case, according to the form of the declaration, the objection did *not* appear upon the *record*; but it was necessary for the plaintiff to prove a consideration at the trial; and if he had not, he must have been nonsuited or have had a verdict against him. But Lord *King* held, that his *owning the money lay ready*, was an *assent*, and *admission of assets*, and a sufficient consideration.

In *Keech* versus *Kennegal*, 1 *Vez.* 125. Lord *Hardwicke* expresly holds, that *assets* coming to an executor's hands, is a sufficient consideration to support a promise; and he puts that case upon the same footing as a promise in consideration of *forbearance*. His lordship says, "at law, if an executor promises to pay a debt "of his testator's, a consideration must be alleged, as of *assets* "*come to his hands*, or of forbearance; or if admission of assets is "implied by the promise; otherwise it will be but *nudum pac-* "*tum*, and not personally binding on the executor."

In *Trevinian* versus *Howel*, *Cro. Eliz.* 91. it was adjudged, that *having assets*, is a good consideration for a promise, and the judgment, which was *de bonis propriis*, was affirmed: And two other cases are there cited where the same point had been so determined.

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Laſtly, The caſe of *Atkins* verſus *Hill*, *Eaſter*, 15 *Geo.* 3. *ſupra*, 284. is in point. The declaration was the ſame, and the objection the ſame as in the preſent caſe; and the court unanimouſly held that the promiſe was good, and that the action well lay.

I agree with my lord, that the rule laid down at the bar, as to what is or is not a good conſideration, is much too narrow. The true rule is, that wherever a defendant is under a moral obligation, or is liable in conſcience and equity to pay, that is a ſufficient conſideration. Some of the caſes which I have mentioned, go fully to that extent. But even if the narrow rule which has been mentioned were adopted, as the true rule, yet in this caſe, I think the conſideration is ſufficient; for here is both a loſs to the plaintiff, and a benefit to the defendant, ariſing from that which is the conſideration of the promiſe. The loſs to the plaintiff is, that the effects which are liable to the payment of the legacy have not been ſo applied: but the defendant has detained them in her own hands for other purpoſes. The benefit to the defendant is, that ſhe has received thoſe effects, and has them ſtill. The defendant is bound in conſcience, to apply the effects towards the diſcharge of the debts and legacies: She is a truſtee for that purpoſe; and is guilty of a breach of truſt in not ſo doing: And it is admitted that a breach of truſt is a good ground for action.

Therefore I agree in opinion with the reſt of the court, that this rule in arreſt of judgment, ought to be diſcharged.

Per cur. Rule diſcharged.

Saturday, May 27th.

VALE *verſus* BAYLE.

Where a vendee of goods orders a particular mode of conveyance, he muſt ſtand to the loſs, if any happen.

UPON a rule to ſhew cauſe why the *nonſuit* in this caſe ſhould not be ſet aſide, and a new trial granted; *Aſhhurſt* juſtice read the report as follows: This was an action for goods ſold and delivered: At the trial, a letter from the defendant to the plaintiff was produced, containing a commiſſion to the plaintiff for the goods in queſtion, after which was added the following poſtſcript; "Pray be expeditious in ſending them; and inſtead of letting them go by way of *Briſtol*, where many "things you have ſent me have been detained, ſend them by "*land carriage.*" The witneſs proved the delivery of the goods to the book-keeper of the *Birmingham* carrier, to be ſent from thence, by way of *Coventry*, to the defendant, who lived at *Carmarthen*

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marthen. It appeared that there was *no other mode of conveyance by land carriage*, and the goods were loſt on the road. Upon this evidence it was inſiſted, that the delivery of the goods to the carrier, was a delivery to the defendant; but the judge who tried the cauſe being of a different opinion directed a *nonſuit.*

Mr. *Buller* ſhewed cauſe. The queſtion is, Whether, under the circumſtances of this caſe, the delivery of the goods to the *Birmingham* carrier, was, or was not, a delivery of the goods to the defendant himſelf. I inſiſt it was not; for as the letter relative to the mode of conveyance, did not contain any directions to the plaintiff, to ſend the goods by any particular perſon, but only an order to convey them by *land carriage generally*; the carrier to whom the plaintiff thought fit to deliver them, muſt be conſidered as the *ſervant* of the *plaintiff*, and not as the *ſervant* of the *defendant*; conſequently the plaintiff was anſwerable for his negligence. If this were a delivery to the defendant, the plaintiff could in no event have countermanded the goods. But ſuppoſe, before actual poſſeſſion of them by the defendant, he had become bankrupt; no doubt but the plaintiff might in that caſe have ſtopped them *in tranſitu*: and would not have been obliged to come in as a creditor only under the commiſſion. This was expreſsly ſettled in the caſe of *Birkett* and others aſſignees *verſus Jenkins*, *Paſch.* 11 *Geo.* 3. *B. R.* The court in that caſe held generally, that whenever goods delivered to the order of the vendee, are only *in tranſitu*, the vendor, in caſe of a failure, may get them back any how he can. Here the goods, at the time they were loſt, were only *in tranſitu*; and, therefore, if a failure had happened, might have been taken back by the plaintiff; conſequently, till actual delivery, they were his goods and his property, and not the property of the defendant.

Mr. *Green* in ſupport of the rule. Wherever a perſon gives another a lawful authority to do an act for him, the perſon who gives the order, is anſwerable for all the conſequences that may attend the execution of it. By the written order, in this caſe, it is plain there had been former dealings between the plaintiff and defendant; and that a particular mode of conveyance had been made uſe of; namely, by way of *Briſtol*: But on account of the goods having been frequently detained, the defendant complains of that mode of conveyance, and at the ſame time deſires the parcel in queſtion, may be ſent *by land carriage.* Now it is admitted, that if a vendee names a *particular* carrier, delivery to that particular carrier, veſts the property in the vendee; becauſe

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made in purſuance of his order. Here the defendant expreſsly directs the goods to be ſent by land carriage; and it is in proof, that there was no other mode of land carriage, than that which the plaintiff adopted. If ſo, this is a particular order on the part of the defendant, and the delivery in conſequence of it veſted the property in him. And ſo it would have been, even if there had been more carriers than one, as appears from a caſe cited in 3 *P. Wm.* 186. where it was held by Lord Chief Juſtice *Eyre*, "That though a trader in the country does not appoint a carrier "yet if the goods be embezzled, he ſhall be liable, becauſe he "leaves it in the breaſt of the perſon to whom he gives the order, "to ſend them by whom he pleaſes." Therefore the plaintiff is entitled, and a new trial ought to be granted.

Lord MANSFIELD. I have a difficulty to find a queſtion in this caſe; for it reſolves itſelf into this ſhort point; *viz.* Whether, in a diſpute between vendor and vendee, the vendor is excuſed from delivering goods according to the order of the vendee?

His Lordſhip, after ſtating the caſe, ſaid, the material part of the letter is as follows; "I beg you will ſend them by *land car-* "*riage*, as they are detained a long time at *Briſtol* before they ar- "rive." This is an expreſs order to ſend the goods by land carriage. The plaintiff, in obedience to this order, ſends them accordingly, and they are delivered to the book-keeper of the *Birmingham* carrier, at his warehouſe in *Coventry*, to be forwarded to the defendant at *Carmarthen*. The box was loſt, and the witneſs ſaid, that before this time his maſter had always ſent goods to the defendant, by the way of *Briſtol*, and that there was no other mode of ſending them, by land carriage, than by way of *Birmingham*. There was no evidence in contradiction to this. Then what is the caſe? It is as much as if the defendant had mentioned the *Birmingham* carrier particularly by name; for there being but one carrier, the plaintiff had no choice by whom to ſend them.

If a vendor take upon himſelf actually to deliver the goods to the vendee, he ſtands to all riſques; but if the vendee order a particular mode of conveyance, the vendor is excuſed.

With regard to the queſtion between a vendor, and the general creditors of a vendee, who becomes a bankrupt, as in the caſe of *Birkett* verſus *Jenkins*, a vendor before actual poſſeſſion by the vendee, has a lien upon the goods he ſends; and if he can get them *in tranſitu*, to be ſure he has the benefit of that lien. But that has no relation to a tranſaction, as this is, between vendor and vendee.

Therefore

Therefore I am of opinion that the rule for ſetting aſide the *non-ſuit* ſhould be made abſolute, and a new trial granted. 1775.

The three other judges concurred.

Rule abſolute without payment of coſts.

VALE *verſus* BAYLE.

REX *verſus* JACKSON.

Monday, May 29th.

THE defendant had been convicted upon *Stat.* 28 *Ed.* 1. *c.* 20. for making ſilver plate of worſe alloy than the ſtandard alloy of the realm. The indictment contained alſo a count upon *ſtat.* 6 *Geo.* 1. *c.* 11. and a third count for an offence at common law. The defendant was found guilty upon all the counts. In *Michaelmas* term 1774, Mr. *Dunning* moved in arreſt of judgment upon the ground of the *Stat.* 28 *Ed.* 1. *c.* 20. being repealed; when the court took time to conſider, and to look into the ſeveral acts of parliament.

The *Stat.* 28 *Ed.* 1. *c.* 20. which prohibits the making ſilver plate under the ſtandard alloy, is not repealed by any of the ſubſequent ſtatutes againſt the ſame offence: they only add accumulative penalties.

Lord *Mansfield* now declared the opinion of the court, as follows.—This is an indictment againſt the defendant, for making ſilver plate under the ſtandard alloy; and a motion has been made in arreſt of judgment, founded upon this objection, namely, that the *Stat.* 28 *Ed.* 1. *c.* 20. which is one of the ſtatutes againſt which the offence is laid, is repealed. This ſtatute being a prohibitory law, if it be ſtill in force, the proper remedy under it is by indictment. We are all of opinion *it is ſtill in force*, and not repealed or abrogated by any of the ſubſequent ſtatutes ſince enacted. This ſtatute is the firſt ſtatute on the ſubject, and inflicts a puniſhment of *impriſonment*, and by ranſom at the king's pleaſure, on goldſmiths who ſhall make ſilver wares worſe than the ſterling alloy.

The ſterling alloy is eleven ounces two pennyweights of fine ſilver, and eighteen pennyweights of alloy in the pound weight troy; which the mint indenture calls the *right old ſtandard* for the ſilver monies of *England*; and it was in uſe before the conqueſt, as appears by the ſeveral treatiſes on ſilver coins. The *Stat.* 2 *H.* 6. *c.* 14. inflicts a penalty of double the value, on goldſmiths ſelling or ſetting to ſale ſilver wares, worſe than ſterling, or before touched or marked. The *Stat.* 18 *El. c.* 15. inflicts a forfeiture of the value, on goldſmiths working, ſelling, or exchanging ſilver plate, leſs in fineneſs than eleven ounces two pennyweights, or before they have ſet their mark thereto. The *Stat.* 21 *Jac.* 1. *c.* 28. *ſect.* 11. *No.* 45. repeals the words in the *Stat.* 28 *Ed.* 1. "that none ſhall make kings' croſſes or locks." The *ſtat.* 8 *W.* 3.

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8 *W.* 3. *c.* 8. *ſect.* 9. made to encourage the then ſilver coinage, aboliſhed or ſuſpended the *old* ſtandard of eleven ounces two pennyweights, and eſtabliſhed the *new ſtandard* of eleven ounces ten pennyweights in it's ſtead, and inflicted a forfeiture of the plate, or the value thereof, on perſons working or putting to ſale, or exchanging any manufacture of ſilver, leſs in fineneſs than eleven ounces ten pennyweights, or until marked with the new ſterling marks. The *Stat.* 6 *Geo.* 1. *c.* 11. *ſect.* 1. and 3. revived and eſtabliſhed the old ſtandard of eleven ounces two pennyweights, inſtead of the new ſtandard eleven ounces ten pennyweights, and continued the new ſtandard penalties for ſecuring the ſaid old ſtandard; and *ſect.* 2. enacted that no goldſmith ſhould be obliged to work ſilver plate according to the new ſtandard. *Sect.* 41. continued both the old and the new ſtandards, and directed them to be marked with diſtinguiſhing marks; and ſubjected offenders to the *penalties and forfeitures* preſcribed by *any* of the laws then in *being* concerning wrought plate. The *Stat.* 12 *Geo.* 2. *c.* 26. in the preamble *recites* the ſtatute of 28 *Ed.* 1. 2 *H.* 6. and 18 *Eliz.* and two other acts reſpecting country aſſay offices, and recites them *as ſubſiſting laws*; and that notwithſtanding the aforeſaid acts of parliament, great frauds were daily committed in the manufacturing gold and ſilver wares, for want of ſufficient power effectually to prevent the ſame: And therefore, *ſect.* 1. inflicts a penalty of 10*l.* for every offence, recoverable by action: But this act ſays not one word as to the repeal of any of the former laws.

Now it is a general rule, that ſubſequent ſtatutes which add accumulative penalties, do not repeal former ſtatutes. 6 *Mod.* 140. 11 *Rep.* 63. *b.*

I am furniſhed with two precedents, one in *Hil.* term 1758. *Rex* verſus *John Prieſt*; the other in *Michaelmas* term 1759. *Rex* verſus *Richard Hawkins*; both of which were tried before me, and where the court afterwards, upon motion for judgment, pronounced ſentence of *fine* and *impriſonment*, *viz.* in the former 6*s.* 8*d.* and ſix months impriſonment; in the latter 6*s.* 8*d.* and three months' impriſonment. No objection was in either of thoſe caſes made, nor was there any argument. Therefore, I ſuppoſe it was taken for granted, as it is at this time by the goldſmiths' company, that the ſtatute was ſtill in force. We are all of opinion it is in force, and conſequently that the indictment is good.

Per cur. *Rule for arreſting the judgment diſcharged.*

THE END OF EASTER TERM.

Trinity

TRINITY TERM 1775.

15 GEORGE III. *B. R.* 1775.

HOGAN Leſſee of HENRY WALLIS, Eſq. and others, *verſus* ROWLAND JACKSON, Eſq. *Tueſday, June* 20th.

ERROR upon a judgment of *B. R.* in *Ireland* in ejectment.

Upon not guilty pleaded, the jury found a ſpecial verdict, the material facts of which were as follow; That the Reverend *George Jackſon*, deceaſed, being ſeiſed of the towns and lands of *Cooliſhall* and *Glanbegg* in *fee*, and of the lands of *Ballyduffultra*, and *Ballygally*, for *lives renewable for ever*, without impeachment of waſte, and of other lands under leaſes for three lives, with reverſionary terms for twenty-one years, from the death of the ſurviving life, named in each leaſe, of *one* of which, *viz.* of a houſe called *Geoghegans*, and ſome *burgeſs* lands, the ſaid *George Jackſon* was the ſurviving life; and being alſo poſſeſſed of perſonal aſſets, to the amount of 1,300*l.* duly made his will, by which, after diſpoſing of his ſoul and body, he made the following diſpoſition of his eſtate.

One ſeiſed of the lands of *C.* and *G.* in *fee*, and of other lands of *B.* and *B.* for *lives renewable for ever*, and of other lands under leaſes for three lives with *reverſionary terms for* 21 *years*, from the *death* of the *ſurviving life* in each leaſe; and being himſelf the *ſurviving life* in one, deviſes thus: *And as to my worldly ſubſtance*, I give to my mother my houſe and lands of *G.* with the

"AND AS TO MY WORLDLY SUBSTANCE, I give and bequeath "to my dearly beloved mother, *Mary Jackſon*, my houſe and "lands of *Glanbegg*, and all their appurtenances, for and during "the term of her *natural life*, clear and free of any deduction "or charge whatſoever: And alſo the lands of *Ballygally*, "ſubject to the rent only payable thereout, for the term of "her *natural life, without liberty of committing waſte thereon.*"

appurtenances *during her natural life*, clear of any deduction; and alſo my lands of *B.* ſubject to a rent payable thereout, *for life, without liberty of committing waſte thereon*; and after ſeveral legacies and annuities to different relations, to his heir at law, and to the natural children of his brother, deviſes to his mother, *all the remainder and reſidue of* all *his effects*, both *real* and *perſonal*, which he ſhall die poſſeſſed of. The mother by the reſiduary clauſe takes a *fee* in all the teſtator's fee ſimple eſtates, and the whole of his intereſt in the reſt of his real property, ſubject to the charges thereon.

He

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He then gives to *Ellen Corkeran*, the ſum of 30.. to be paid her yearly, during her life, for the ſupport of herſelf and her ſon *George Jackſon*. To her daughter *Ellen*, and her ſon *John Jackſon* reſpectively, the yearly ſum of 20 *l.* to be paid half yearly, till their reſpective ages of twenty-one years; and then he gives them reſpectively the ſum of 500 *l.* He gave the ſaid *George Jackſon* the yearly ſum of 20 *l.* 'till the age of twenty-one; and then the ſum of 400 *l.* All which bequeſts were to be *raiſed* and levied out of his lands of *Glanbegg* and *Cooliſhall*, *Ballygally*, and *Ballyduffultra*. He alſo gave his couſin *Henry Wallis*, the ſum of 1,000 *l.* ſterling, to be paid him as ſoon as conveniently might be after his deceaſe. *To his uncle Edward* Jackſon, the yearly ſum of* 30 *l. ſterling during his life.* He alſo gave unto his uncle *John Wallis*, the ſum of 100 *l.* ſterling. And unto his relation *William Kenah*, and *Jane* his wife, the ſum of 200 *l.* ſterling.

* *Edward Jackſon* was the preſumptive heir of the teſtator.

And then deviſed as follows, "*I alſo give and bequeath unto* "*my dearly beloved mother, Mary Jackſon, all the* REMAINDER "*and* RESIDUE *of* ALL *the* EFFECTS *both* REAL *and* PERSONAL, "which I ſhall die poſſeſſed of." And concludes with the appointment of *executors*, &c.

Deviſe upon which the queſtion ariſes.

That the teſtator died without altering or revoking his ſaid will, leaving *Edward Jackſon* his heir at law; who died inteſtate, leaving the defendant his only ſon and heir at law. That *Mary Jackſon*, under whom the leſſors of the plaintiff claimed, died ſeiſed, &c. That the lands of *Glanbegg* and *Ballygally* were, at the date of the will, of the yearly value of 150 *l.* ſubject to a payment of 45 *l. per annum*, and the woods belonging thereto, worth 200 *l.* That the lands of *Cooliſhall* and *Ballyduffultra*, were of the yearly value of 350 *l.* ſubject to 60 *l.* a year quit-rent; and the woods belonging thereto, in the year 1769, worth 4,500 *l.* That the lands of *Glanbegg* and *Cooliſhall*, were incumbered to the amount of 4,900 *l.* at the date of the will, and 4,500 *l.* at the teſtator's death. That all the legatees were alive at the teſtator's death. That the *yearly value* of the teſtator's *chattels real*, was 30 *l.* and the *groſs* value at the time of making his will, and at his death, was 240 *l.*

The queſtion upon theſe facts was, Whether the leſſors of the plaintiff were entitled?

After ſeveral arguments in the court of *King's Bench*, in *Ireland*, the court gave judgment in favour of the defendant, *Rowland Jackſon*, againſt the opinion of Mr. Juſtice *Robinſon*.

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Mr. *Alleyne* for the plaintiff, ſtated the queſtion to be, Whether under the reſiduary clauſe, all the teſtator's real eſtates paſſed to his mother *Mary Jackſon*, in ſo full and ample a degree, as to enable her to deviſe the ſame to the leſſors of the plaintiff? And he inſiſted they did.

Firſt, It is apparent, that the great and chief object of the teſtator's bounty was his mother. Therefore, by way of ſecuring a certain proviſion to her, he firſt gives her a life eſtate in two denominations of his real property: he then proceeds to diſpenſe his bounty amongſt all his other relations; and perceiving there was ſtill a ſurplus undiſpoſed of, by one general ſweeping clauſe, he deviſes to his mother every ſpecies of property he ſhould die poſſeſſed of.

Secondly, That the teſtator did not mean to die inteſtate, as to any part of his real or perſonal property, is manifeſt, not only from the ſtrong language of the reſiduary clauſe, but from the introductory words of the will, "*As to all my wordly ſubſtance*," which have always been underſtood to include both real and perſonal eſtate, and to indicate an intent in the teſtator, who uſes them, to diſpoſe of all his property. 2 *Vern.* 690. *Beachcroft* v. *Beachcroft*. "*All his worldly eſtate*," compriſes all a man has in the world. *Ibbetſon* v. *Beckworth*, *Forreſter*, 157, "*As touching my worldly eſtate*," in the introductory part of a will, is ſtrong proof that a teſtator means to diſpoſe of all his property.—*Grayſon* v. *Atkinſon*. 1 *Wilſ.* 333. "*As to all my temporal eſtate*," I give, &c. as follows; and afterwards the teſtator concludes thus: "*All the reſt of my goods and chattels, real and perſonal, moveable and immoveable, as houſes, tenements*," &c. without the word *eſtate*, held, to paſs *a fee*.—*Tanner* v. *Wiſe*, "*As to my temporal eſtate*," I deviſe as follows; and afterwards deviſes the *reſt and reſidue* of his *eſtate, goods, and chattels*; held, that theſe words paſſed a *fee*. 2 *Atk.* 37. 3 *Burr.* 1,618.—*Gulliver ex dim. Jefferies* v. *Poyntz*. *Mich.* 11 *Geo.* 3. *C. B.* a deviſe of a *meſſuage*, &c. to *A.* with ſpecial circumſtances, was held to carry arable, meadow, and paſture lands, appurtenant to the ſaid meſſuage. Therefore, any words which indicate an intention of the teſtator to diſpoſe of *all* his eſtate, will take effect and paſs every part of his property.

It may be objected, that the words, "*all the remainder and reſidue*," cannot take in all the teſtator's eſtate, but only ſuch parts of it as are not before mentioned or deviſed. But in *Alleyne*, 28, deviſe of a manor to *A.* for ſix years, and afterwards the reſidue of all his lands to *J. S.* was held to paſs the reverſion of the manor.

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manor. So in *Norton* v. *Ladd.* 1 *Lutw.* 755. upon a deviſe to *A.* for life, and after her deceaſe, the whole remainder of the lands to *B.* it was held, a remainder in fee ſimple paſſed. In *Cheſter* v. *Cheſter*, 3 *P. Will.* 56. *A.* on the marriage of his ſon *B.* ſettled *part* of his lands on *B.* in tail, and being ſeiſed in fee of the *reverſion of theſe lands*, and of other lands in poſſeſſion, deviſes *all his lands* and hereditaments, *not otherwiſe* by him *ſettled or diſpoſed of*; and it was held the reverſion in fee paſſed. He alſo cited *Rogers* v. *Rogers*, *Forreſter*, 268, and *Ridout* v. *Payne*, 3 *Atk.* 486. and prayed judgment of reverſal.

Mr. *Buller*, *contra*. All the caſes cited by Mr. *Alleyne*, are diſtinguiſhable from the preſent, 1*ſt*. It is an eſtabliſhed rule of law, that an heir at law ſhall not be diſinherited, but by expreſs words or neceſſary implication. 2*dly*, It is a ſettled rule in the conſtruction of wills, that the whole of the will muſt be taken together, and nothing is to be rejected which has a determinate and fixed meaning in itſelf. And 3*dly*, Where words uſed by a teſtator are indifferently applicable to real and to perſonal eſtate, they ſhall not be applied to the real, in diſinheriſon of the heir at law.

Firſt, There is clearly no expreſs deviſe of the real eſtates. The word *effects* is properly applicable *only* to *perſonal* eſtate. All the dictionaries explain it by the words "*goods* and *moveables*:" And as to the word *real* annexed to it, it can apply only to *chattels real*, which it is found by the verdict the teſtator died poſſeſſed of: ſo that it is not a nugatory or ſuperfluous word. Nor is there any neceſſary implication, that the teſtator intended any greater intereſt in his real property for his mother, than the eſtate for *life* expreſsly limited in the *two denominations*. On the contrary, ſuch an implication would be forced and inconſiſtent: for, to what purpoſe in the firſt part of his will could he want to reſtrain her from *committing waſte*, if it was his intention, in the latter part of it, to give her the abſolute property and dominion over it?

But *ſecondly*, it is contended, that the *introductory* words, "*As* "*to all my worldly ſubſtance*," indicate an intention in the teſtator to diſpoſe of *all* his property; and ſeveral caſes have been cited. As to *Beachcroft* v. *Beachcroft*, 2 *Vern.* 690. and *Ibbetſon* v. *Beckwith*. *Caſ. temp. Talbot*, 157; in both thoſe caſes, the introductory words were, "As to all my worldly *eſtate*;" and ſo were the words of the ſubſequent deviſe in thoſe caſes, "*my eſtate*." Now the word *eſtate*, is a technical, legal expreſſion, and properly applicable to real *eſtates*; and, therefore, a deviſe of "*all a man's* "*eſtate*,"

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"*eſtate*," has been held to carry a fee, without any words of limitation. But here the introductory words are, "*worldly ſubſtance*," which are the mere formal words of the ſcrivener, without any legal ſignification annexed to them. At moſt they can only import, that the ſubſequent diſpoſitions in his will relate to his worldly ſubſtance; but they in no wiſe expreſs or imply the extent or *quantum* of ſuch diſpoſitions. The caſe of *Grayſon* v. *Atkinſon*, 1 *Wilſ.* 333. inſtead of being an authority for the plaintiff, is in point for the defendant. For there, Lord *Hardwicke* ſaid, if the teſtator had not, by uſing the words, "*as houſes, gardens, tenements*," &c. ſufficiently explained what he meant by the "REST *of his goods and chattels* REAL *and perſonal, moveable and immoveable*," thoſe words would not paſs a fee by the law of *England*, though they might have ſo done by the civil law. *Thirdly*, The words "remainder and reſidue of my effects, "both real and perſonal," do not neceſſarily refer to *real* eſtate, but are equally applicable to *perſonal*; and if ſo, they ſhall not be extended to diſinherit the heir at law. *Pre. Chan.* 471, *Piggot* v. *Penrice*. "There *A.* made one executrix of all his goods, lands "and chattels, and died, not having any *leaſehold* intereſt." Lord *Cowper* ſaid, "whatever his private opinion might be of the intention of the teſtatrix, to paſs her lands, of *inheritance*, yet in point of judgment he could not decree for the executrix; becauſe an heir is never to be diſinherited but by expreſs words, or neceſſary implication."—But 12 *Mod.* 592. is expreſsly in point. There the teſtator being ſeiſed of *five* meſſuages, after making a complete deviſe of *four* of them, ſaid, "*and all the overplus of my eſtate to* "*be at my wife's diſpoſal*:" And it was held, the *fifth* houſe did *not* paſs by this ſtrong reſiduary clauſe. *Trevor*, *C. J.* ſaid, "In the conſtruction of *Wills*, generally the words, "*my eſtate*, "*the reſidue of my eſtate*, or *the overplus of my eſtate*, may well "paſs an inheritance, where the intention is *apparent*; but it "muſt be *very apparent*, and *neceſſary* from the words of the "will. For if the words be indifferent to real and perſonal "eſtate, or may be applied to perſonal eſtate alone, there the "heir at law is not to be diſinherited."—Here, the other parts of the will are ſo far from requiring ſuch a conſtruction, that we deſtroy them if we admit it. The words, in their moſt proper ſenſe, apply, to *perſonal* eſtate: They immediately follow the diſpoſitions which affect *only* the *perſonal* eſtate; and the chattels real, left by the teſtator, ſhew the reaſon for his annexing the word *real* to *effects*; which otherwiſe properly mean *moveables* only,

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only, and fully satisfy those words. They ought not therefore to be extended to real estate. But suppose they were applicable to real estate, the mother could at most take only an estate for life, because no words of limitation are added; and without words of limitation, a devisee of real estate can only take an estate for life in the premises bequeathed to him. He cited also *Frogmorton* v. *Wright*. 3 *Wils*. 415. and *Wilkinson* v. *Merriland*, 3 *Crok*. 447-9. in which latter case the court held, that a devise "of "the residue of all his goods, leases, *estates*, &c. *whereof he was* "*possessed*," did not pass *lands* in *mortgage forfeited*; and the rather, because of the words, "*whereof he died possessed*," because they relate only to *personalty*. Here the words are, "*whereof he* "*shall die possessed*."—*Fourthly*, Words of doubtful construction shall not overturn former words that are clear and express. *Bamfield* v. *Popham*. 2 *Vent*. 449. 451. 1 *P. Wm*. 54-5. *S. C*. Here, the case is not only doubtful, having been argued four times before in *Ireland*; but the devise to the mother for life, *without power of waste*, is incompatible with an intention to give her the same land in fee. Therefore, upon the whole, the rules of law must take place, and the title of the heir at law be preferred.

Lord MANSFIELD.—There is but one point upon which the whole case turns: which is, to fix the meaning of the word *effects* in the *English* language. It is nugatory to cite cases, unless you fix the meaning of the term to which they are to be applied. If the word *effects* is equivalent to *worldly substance*, used by the testator in the beginning of his will, or if it is synonimous to property, there is an end of the question: because then all the cases prove, that the sweeping clause passes a fee. On the contrary, if it can be shewn that *effects* mean *chattels*, or personalty *only*, then the residuary clause can include them *only*. I take *effects* to be synonimous to *worldly substance*, which means whatever can be turned to value; and, therefore, that real and personal effects mean all a man's property.

Mr. *Alleyne*, in reply, endeavoured to shew that the words "*real effects*" were equivalent to *real assets*, and that real and personal effects meant, in the place the testator used them, all the property he had in the world.

Lord MANSFIELD.—As this cause has already been nine years depending in *Ireland*, and as the court has no difficulty upon the question, which turns upon the construction of a very few words of the will, I think it is right that

that we ſhould give our opinion directly, without adding further delay, by deferring it to a ſecond argument. 1775.

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His Lordſhip enumerated the different ſpecies of the teſtator's property, and ſtated the different bequeſts of the will, which he obſerved were material to be attended to in the conſtruction of it, and then proceeded thus:

This cauſe was commenced in the life time of Mrs. *Mary Jackſon*; but ſhe is now dead, and by her will has left the eſtate, which is the particular property in queſtion, to *H. Wallis* the couſin of *George Jackſon* deceaſed (to whom by his will he gave the legacy of 1000 *l.* before-mentioned) and to the three natural children of *Ellen Cockeran*, who are the leſſors of the plaintiff.

The queſtion which ariſes upon this ſpecial verdict and upon the conſtruction of this will is, Whether, by virtue of the ſweeping clauſe, any *real* property at all paſſed to *Mary Jackſon*, the mother of the teſtator? and if any did, Whether any thing paſſed except the *covenant* for the term of 21 years, in the houſe called *Geoghegans* and *Burgeſs* lands thereto belonging, being a title to a *chattel real*? And if the reſt of the real property of the teſtator, or a remainder therein, paſſed, Whether it can paſs for a longer time than during the *life* of *Mary Jackſon*, becauſe there are no words of limitation?

By the *Roman* law, a will conſtituted the *hæres* or heir, and was the appointment of him. He was the ſame perſon as in our law is termed the executor. But the nomination of an heir was ſo eſſential an ingredient of the *Roman* teſtament, that there could be no complete will without him; and from his name and office, he was conſidered, at the death of the teſtator, as univerſal ſucceſſor to all the goods, rights, and property of the deceaſed; *without any regard* or diſtinction as to property acquired by him, *prior* or *ſubſequent to* the time of making his will.

But that is different from the nature of a deviſe of land by the law of *England*, which formerly admitted of no teſtamentary diſpoſition, in caſes of *real* property. This reſtriction took place upon the introduction of military tenures, and was a branch of the feodal doctrine of non-alienation without the conſent of the Lord. But when the rigour of the reſtriction came by degrees to be relaxed, and tenants were permitted to make diſpoſitions by teſtament, a deviſe of lands operated as an appointment to uſes, in nature of a legal conveyance. As ſuch, the courts of law in the conſtruction of them held, that a deviſe affecting lands could operate only upon ſuch real eſtates as the teſtator had at the time

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of executing and publiſhing his will; and not upon any after purchaſed or acquired lands: Becauſe there could be no legal conveyance at common law of what a man ſhould acquire in future.

Another diſtinction, founded upon the notion that a will affecting lands is merely a ſpecies of conveyance, and derived from the ſame ſource, is this. The law of *England*, in the conveyance of real eſtates, requires words of limitation in the donation or grant, to the creation of a fee. Without the word *heirs*, general or ſpecial, no man can create a fee at common law by conveyance. When wills therefore were introduced, and deviſes of real property began to prevail; being conſidered as a ſpecies of conveyance, they were to be governed by the ſame rule. Therefore, by analogy to that rule, in the conſtruction of deviſes, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, ſo as to denote the intention of the teſtator to convey the inheritance to the deviſee; he can only take an eſtate for life. For inſtance, if a teſtator by his will ſays, I give my lands, or ſuch and ſuch lands to *A.*; if no words of limitation are added, *A.* has only an eſtate for life.

Generally ſpeaking, no common perſon has the ſmalleſt idea of any difference between giving a perſon a horſe and a quantity of land. Common ſenſe alone would never teach a man the difference; but the diſtinction which is now clearly eſtabliſhed, is this: If the words of the teſtator denote only a *deſcription* of the *ſpecific eſtate* or *lands deviſed*; in that caſe, if no words of limitation are added, the deviſee has only an eſtate for *life*. But, if the words denote the *quantum* of *intereſt* or property that the teſtator has in the lands deviſed; there, the *whole* extent of ſuch his *intereſt* paſſes by the gift to the deviſee. The queſtion therefore is always a queſtion of conſtruction, upon the words and terms uſed by the teſtator. It is now clearly ſettled, that the words "*all his eſtate*," will paſs *every thing* a man has: But if the word "*all*" is coupled with the word "*perſonal*" or a *local deſcription*, there, the gift will paſs only perſonalty, or the ſpecific eſtate particularly deſcribed.

All theſe principles being clearly ſettled and certain, the queſtion in this caſe comes to a queſtion of conſtruction upon the will itſelf. Now, in this will, there are ſeveral things which it is material to obſerve. And firſt, the *introduction* is very material. Introductory words cannot vary the conſtruction of a deviſe, ſo as to enlarge the eſtate of a deviſee, unleſs there are words in the deviſe itſelf ſufficient to carry the degree of intereſt contended

contended for. But wherever they aſſiſt to ſhew the intention of the teſtator, the courts have laid hold of them, as they do of every other circumſtance in a will, which may help to guide their judgment to the right and true conſtruction of it. The introductory words uſed by the teſtator in the preſent caſe, are not ſtrict legal terms; but they are the words of a plain man of ſound learning. He ſays, "*As to all my worldly ſubſtance*, I give, *&c.*" What is *ſubſtance?* It is *every property* a man has. So, in the *Statute* 4 and 5 *Phil.* and *Mar. c.* 8. for the puniſhment of ſuch as ſhall take away maidens that be inheritors, the word *ſubſtance* is made uſe of, and means *worldly wealth.*

Thus the teſtator ſets out. He then proceeds to diſpoſe of his property, and in the courſe of his will provides for every body: For his mother, his uncle, his miſtreſs, his natural children, his couſins; and makes a particular proviſion for his heir at law, which proviſion is to continue *during his life.* To be ſure, that circumſtance alone would not exclude the heir from taking any thing not diſpoſed of. But it furniſhes an argument in favour of the conſtruction contended for by the repreſentatives of the mother; namely, that he intended the remainder of every thing to go to her by the ſubſequent reſiduary deviſe; and that he did not mean to die *inteſtate* as to any part of his property. He adds the ſweeping clauſe, after all the proviſions before mentioned; at the ſame time not meaning to make his mother executrix. What purpoſe then was it to anſwer? I confeſs I can ſee none, unleſs it were to diſpoſe of all his worldly ſubſtance agreeable to his declaration in the introductory part of the will. The words are, "I alſo give to my mother all the *remainder* and *reſidue* of "*all* the *effects*, both *real* and *perſonal*, which I ſhall die poſſeſſed "of." Now, is the true conſtruction of theſe words to be confined to a gift of *perſonalty* only? Moſt clearly not; becauſe the teſtator has expreſsly added the word *real* to the word *effects.* Do the words *real effects* in law, mean *real chattels only?* No authority has been produced to ſhew that they do: And in point of fact, there was but one leaſe belonging to the teſtator in this caſe which could come under that deſcription: Conſequently, if the conſtruction contended for by the defendant were the true one, only that leaſe would paſs; which would be to narrow the conſtruction of the word *real* very much indeed. The natural and true meaning of *real effects* in common language and ſpeech is real property; and *real* and *perſonal effects* are *ſynonimous* to *ſubſtance*, which includes every thing that can be turned into money.

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In ſeveral clauſes of the bankrupt laws which make it felony in a bankrupt to conceal, remove, or embezzle any part of his goods, wares, merchandize, monies or *effects* *; the word "*effects*" is made uſe of in this ſenſe. If that be the true conſtruction, there can be no doubt, but that the words, *remainder* of *real effects*, include the reverſion of every thing not diſpoſed of; in which caſe, no words of limitation were neceſſary.

* Vide ſtat. 4 & 5 *Ann.* c. 17. *ſect.* 1. ſtat. 5 *Ann.* c. 22. *ſect.* 1. ſtat. 3 *Geo.* 1. c. 12. *ſect.* 2. ſtat. 5 *Geo.* 1. c. 24. *ſect.* 1. ſtat. 5 *Geo.* 2. c. 30. *ſect.* 1.

But an objection has been made from the teſtator's giving his mother a *ſpecific eſtate* for *life*, and making that eſtate liable to *impeachment of waſte*; which, it has been ſtrongly contended, is totally repugnant to and inconſiſtent with an intention to give her the abſolute property in a ſubſequent part of the ſame will. As to that, there might poſſibly be reaſons for his doing ſo, eſpecially as he had, in reſpect of that ſpecific eſtate, given her a preference to all his general creditors and legatees; by deviſing it free of all incumbrances. But I do not think the objection of *itſelf* ſufficiently ſtrong, to controul the manifeſt operation of the ſubſequent words, uſed by the teſtator in the reſiduary deviſe. It would be going a great way indeed, to lay it down as a general rule, that where a particular eſtate is given to a perſon in one part of a will, and the teſtator afterwards deviſes to him in more general words, that he ſhall not reap any benefit of ſuch reſiduary deviſe. Indeed, as to this objection, the caſe of *Ridout* v. *Paine*. 3 *Atk.* 486. is exactly in point. There, the teſtator, in the firſt inſtance, gave his wife only an eſtate *for life*, in *part* of his real eſtate, and afterwards bequeathed her the *reſidue*, &c. The objection of inconſiſtency, now ſo ſtrongly relied on, was there made; but Lord *Hardwicke* over-ruled it, and held the reſiduary clauſe carried the inheritance notwithſtanding. That caſe is alſo very near in point as to the other objections made to day. For the only difference between the ſweeping clauſe in that caſe and this, is, that the word *eſtate* is uſed inſtead of *effects*. Here the words are, "All the remainder and reſidue of all his "effects, both real and perſonal," which includes all the teſtator's property. All the terms he makes uſe of, except the word "*effects*," are technical terms: For *remainder* is applicable to *real* eſtate, and *reſidue* to *perſonal* eſtate. Therefore the ſame rule of determination that was held in the caſe of *Ridout* v. *Paine*, ought to hold in this caſe. Upon the whole of the will taken together, I am clearly of opinion, that the teſtator meant his mother ſhould take the whole of his property, under the reſiduary deviſe, and that the words he has made uſe of are ſufficient

sufficient to effectuate that intention: Consequently that she took a fee in the fee-simple estates, and the whole of the testator's interest in the rest of his real property, subject to the charges thereon. The result is, that the lessors of the plaintiff are entitled, and that the judgment of *B. R.* in *Ireland* must be reversed. 1775.

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Aston, Justice. I am of the same opinion as I was before *. When this question came on in the *Common Pleas*, in *Ireland*, the mother was alive; therefore it was immaterial whether she took an estate for life or in fee. The words "*real effects*" may relate to real estate; and there are many acts, both in the *English* and *Irish* statutes, in which they can relate to nothing else. So, the word "substance" is applicable to real estate, in the *statute* 4 and 5 *Phil.* and *Mar. c.* 8. I think the intention of the testator in this case is very clear. Therefore, the judgment must be reversed.

* Mr. Justice *Aston* was Chief Justice of the *Common Pleas* in *Ireland*, when the question was agitated there.

Mr. Justice *Willes*, and Mr. Justice *Ashhurst* were of the same opinion.

Per cur. Judgment reversed.

Afterwards, upon a writ of error in the House of Lords, on the 2d of *December* 1776, the judgment of *B. R.* reversing the judgment of the court of *B. R.* in *Ireland*, was affirmed.

BALDWIN *versus* KARVER *et al'*.

Tuesday, June 20th.

THIS was a case out of Chancery for the opinion of this court; the material facts of which were as follow:

Devise to trustees, in trust for the use of the *heirs male* of *J. A.* is *default of such issue*, to the use of the *heirs male* of *R. A.* and in default of such *issue male*, to the use of *all* and every the *grand-children* of *J. A.* and *S. M.* as tenants in common.

Richard Ashwin being seised and possessed of a considerable real and personal estate, made his will on the 8th of *June* 1756, and thereby, after making provision for his wife, and leaving certain legacies, divided the residue of his estate thus: "I do hereby "give and bequeath all the rest, residue, and remainder of my "personal estate and effects whatsoever, not herein before, or "herein after bequeathed, unto my said wife, *Sarah Ashwin*, "*Thomas Taylor*, and *John Karver*, *to hold* all and singular the "said lands, tenements and premises, and personal estate what-"soever, to them my said trustees, and the survivor and survivors "of them, and the heirs, executors, and administrators of such "survivor, in *trust* nevertheless, that they, my said trustees, and

By a codicil bearing even date with the will, the testator directs the trustees to pay the *interest* and *produce* of his *real* and personal estate to his wife *S. A.* and to the said *J. A.* and *R. A.* during their lives, with survivorship. *Eight* grand-children were alive at the *date of the will*: a *ninth* was born *before* the testator *died*: *twelve* more were born after his decease, and *all* in the life-time of *R. A.* who died without issue.—Held, that as the *twenty-one grandchildren* were *all alive* at the *death* of *R. A.* *all* were equally entitled.

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" the ſurvivor and ſurvivors of them, and the heirs, executors, " and adminiſtrators of ſuch ſurvivor, do, and ſhall ſtand ſeiſed " and poſſeſſed of the ſaid lands, premiſes, and perſonal eſtate " and effects, *to and for the uſe* and behoof of the *heirs male of* " *the body* of my nephew *John Aſhwin*; and in default of ſuch " iſſue male, then to the uſe and behoof of the heirs male of the " body of my nephew *Richard Aſhwin*; and in default of *ſuch* " *iſſue*, then to and *for the uſe* and behoof of *all and every the* " *grandchildren* of my late brother *John Aſhwin*, deceaſed; and " the grandchildren of my late ſiſter *Sarah Morris*, deceaſed, *to* " *hold* all and ſingular the ſaid lands and premiſes, to them the " ſaid grandchildren of my ſaid brother *John Aſhwin* and *Sarah* " *Morris*, and their heirs, as tenants in common, and not as joint " tenants; and my *perſonal eſtate* and effects, to be equally divided " between them, *ſhare and ſhare alike.*"

That the ſaid teſtator added three ſeveral codicils to his will, the *firſt* of which was as follows: Whereas I *Richard Aſhwin* have this 8th day of *June* 1756, made and executed my laſt will, but I have therein omitted to diſpoſe of the reſidue and increaſe of the ſurplus, and remainder of my real and perſonal eſtate; now I do hereby order, will, and direct, that my ſaid truſtees herein named, ſhall pay and diſpoſe of all the intereſt, and produce, and increaſe, that ſhall from time to time ariſe, or be made of my ſaid real and perſonal eſtate, unto my ſaid wife *Sarah Aſhwin*, and my nephews *John Aſhwin* and *Richard Aſhwin*, and to their aſſigns, ſhare and ſhare alike, with ſurvivorſhip, for and during the term of their three natural lives.

That the teſtator died on the 6th of *November* 1758, leaving *John Aſhwin* and *Richard Aſhwin* his nephews, and the ſaid *John Aſhwin* his heir at law.—That the teſtator's ſaid nephews, *John* and *Richard Aſhwin*, are ſince dead without iſſue, and *Sarah Aſhwin*, the widow, is alſo ſince dead, and that *Richard Aſhwin* was the ſurvivor of them.

That *eight grandchildren*, viz. *two* of *Sarah Morris*, and *ſix* of *John Aſhwin*, were alive at the time of the teſtator's making his will. A *ninth*, *viz.* a grand daughter of *John Aſhwin*, was born after the will, and *before* the teſtator died. After his deceaſe, *twelve* more grand-children of *John Aſhwin* were born, and *all* of them *in the life-time* of *Richard*.

The queſtion was, Whether all, or any, and which of the grandchildren of the teſtator's late brother *John Aſhwin*, and his ſiſter *Sarah Morris* deceaſed, were entitled under this deviſe?

This

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This case was argued twice: first on *Friday February* 3d in *Hilary Term*, 15 *Geo.* 3. by Mr. *Pepys* for the plaintiff, and Mr. *Wallace* for the defendants; and again, in *Easter Term* last, by Mr. *Dunning* for the plaintiff, and Mr. *Mansfield* for the defendants.

For the plaintiff it was argued, that those grandchildren *only* who were *alive at the date of the will*, or at most the *other* grandchild born after the will, and *before the testator's death*, could be entitled; and such was the rule established by all the authorities in the books, in cases where, like the present, there were no peculiarity of circumstances to guide the court as to the real intention of the testator.

That the will and codicil being both executed on the same day, must be taken together; but so as not to lose sight of the order of time. That by the will, no legal estate was vested in the trustees, but by the codicil they had a good estate of freehold during their lives; and there was a vested remainder in the *nine* grandchildren born in the life-time of the testator, subject only to a contingent remainder to the issue male of *John* and *Richard*.

Lord MANSFIELD. The single question is, *which* of the grandchildren are entitled, not what estate they are to take.

Mr. *Pepys*. But there was a remainder vested in those who were alive at the testator's death: For it is an established rule of law, that wherever an estate of freehold is limited to a person for life, with contingent remainders, and an ultimate remainder in fee to a person in *esse*, if none of the intervening remainders amount to a fee, the ultimate remainder is vested. *Chudleigh's Case*, 1 *Rep.* 137; and till the contingent remainder takes place, the right of timber upon the lands is in the ultimate remainderman. *Uvedale* versus *Uvedale*, 2 *Roll. Abr.* 119. *tit. Mæresme*, *pl.* 3. the doctrine of which case is recognized in *Whitfield* versus *Bewit*, 2 *P. Wms.* 240. Therefore, upon these authorities, there was clearly a vested remainder in the grandchildren alive at the time of the testator's death; and if vested, it could not be devested by any other grandchildren who might afterwards come in *esse*.

Secondly, With respect to the *intention* of the testator, and the *inconvenience* that would arise from extending the limitation to *all* the grandchildren who might exist *in futuro*, they contended, that it was more natural for the testator to mean such grandchildren only as were then in being, and whom he knew, than those who might afterwards be born, who were indefinite in number, and the time of their coming in *esse* so uncertain, that

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either the grandchildren alive must wait till their number could be ascertained before any division, or there must be a new partition upon the birth of every additional child. Besides, in that case, if any of them were to die, their father would come in as administrator, contrary to the manifest intention of the testator.—They cited 2 *Atkins*, 121. 1 *Ves.* 114.—*Pre. Chan.* 470, and 1 *P. Wms.* 342. and *Gilb. Cases in Equity*, 136. *S. C.*

For the defendants it was contended, that the apparent intention of the testator was to include *all* the grandchildren of *John* and *Sarah*, who should be alive at the *death* of *John* and *Richard* *without issue*. That in respect of the real estate it was clearly a good remainder; and as to the devise of the personal, it was within the rule of *contingencies* with a double aspect.

As to the question, *which* of the grandchildren were entitled, the benefit intended by the testator was clearly a future and contingent benefit; because, till the death of *John* and *Richard* without issue, nothing was given to any of the grandchildren; and therefore, till then nothing vested: Consequently the testator intended, that all who were in *esse* at that time should take. That the rule of law, as to the time of vesting, was not, as had been contended on the other side. But supposing this estate in common did vest in the grandchildren alive at the testator's death, yet it might be devested in the event of future grandchildren coming in *esse*: Because the estate both of tenants in common and joint-tenants, may vest at different periods. *Co. Lit.* 188. *a. Moore*, 220. *Stanley* versus *Baker*. *Pollexfen* 373. 2 *Vern.* 545. *Cooke* v. *Cooke*. 1 Ld. *Raym.* 310. 2 *Str.* 1172.

Upon the first argument, Lord *Mansfield* started a doubt, whether the devise of the *personal* estate to the grandchildren was not *too remote*.—Upon the second argument his Lordship said, I have no doubt as to the question which of the grandchildren are entitled.—All cases on the construction of wills depend upon the particular penning of the wills themselves, and the state of the families to which they relate, taking also into consideration some general rules to prevent property from being unalienable too long.

A *grandchild* may mean one that a person may have at *any distance of time*, according to the manner in which the testator uses the word. The great point in all cases of this kind is, the *time* when the legacy is to *vest*; for that is the period which the testator looks forward to, when he directs his property to pass from one channel into another. Here the testator does not consider

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ſider the grandchildren as *immediate* objects of his bounty; but only gives them a *poſſibility* or a chance, after an indefinite dying of *John* and *Richard* without iſſue male. He means them as another ſucceſſion; and, therefore, *all* who were *in eſſe* upon that contingency are equally entitled.

But my difficulty is upon the limitation of the real and perſonal eſtate. The rule of law moſt undoubtedly is, that a deviſe to the heirs general or ſpecial of a man alive is void. If the deviſe therefore to the heirs of the body of *John* is to be conſtrued an immediate deviſe, it is of courſe void. But ſuppoſe, by incorporating the will and codicil together, the deviſe of the real eſtate could be ſupported; ſtill it ſtrikes me, as at preſent adviſed, that the ſubſequent limitation of the perſonalty is too remote. Therefore let notice be given to the heir at law of the teſtator, and to the perſonal repreſentative or next of kin of *John*, that they may be heard by their counſel if they think proper.

ASTON Juſtice—As to the queſtion which of the grandchildren are entitled, the material conſideration in all the caſes in the books has been, the time when, or the contingency upon which, the deviſees are to take: and beyond that time none have been let in. *Heath* v. *Heath*. 2 *Atk.* 121. Warren *verſus* Johnſon, 2 *Ch. Rep.* 69. Elliſon *verſus* Airey, 1 *Vez.* 114. Where there is a deviſe to the *children* of *A.* who has only *one* child born at the time of the will, *all* the children *born after* may be let in. *Bateman* v. *Roach*, 2 *Mod.* 104.

Adjornatur.

But now in this term, no counſel appearing for the heir at law or the perſonal repreſentative of *John*, Lord *Mansfield* delivered the opinion of the court as follows:

A doubt occurred upon both arguments, whether *any* of the grandchildren at all were entitled. *Firſt*, In reſpect of the real eſtate, as being deviſed to the *heirs male* of *John*, who was alive at the death of the teſtator: and, *Secondly*, In reſpect of the perſonal eſtate, as being too remote.—As to the firſt, it was ſaid, that the codicil, by which the rents and profits are given to *Sarah*, *John*, and *Richard*, during their lives, was made to obviate this objection; and if ſo, they would take a joint eſtate during their three lives, with limitation in tail male to *John* and *Richard*, with remainder in fee to the grandchildren. But in that caſe, the ſubſequent deviſe of the perſonalty would be too remote: for *John*, as being the firſt tenant in tail, would take the abſolute property.

Upon

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Upon the laſt argument it was ſaid, that the deviſe of the real and perſonal eſtate might be conſidered as a deviſe upon a *double* contingency; that is, in caſe *John* ſhould have a ſon living at his death, then to ſuch ſon; but if none, then to the grandchildren.

Upon that way of ſtating it, it does occur that the whole may be ſupported. It is clear by the *will*, that nothing was meant to paſs to *John* the anceſtor; the deviſe is to the *heirs male of his body*. But thoſe words are followed by others, which ſhew that the teſtator meant to uſe them as *ſynonimous* to "*iſſue male*:" For he goes on thus; "and in default of *ſuch iſſue male*." Suppoſing he did uſe them as *ſynonimous*, to be ſure the reaſonable conſtruction is, that he meant ſuch perſon as ſhould be iſſue male at the time of the death of *John*, and if he left no iſſue, then to the grandchildren.

As to the queſtion, *how many* of the grandchildren are to take, it muſt in all caſes depend upon the ſubject matter of the will. The doctrine is very well laid down in the caſe of *Elliſon* verſus *Airey*, 1 *Vez.* 114. Where one deviſes to *children*, if it be an *immediate* deviſe, there it ſhall only be intended to relate to children *in eſſe* at the time. There is a material diſtinction between this ſort of bequeſt, and a proviſion for children in marriage ſettlements: becauſe in them, as there are no children *in eſſe* before the marriage, and the number is uncertain, it muſt be ſuppoſed the benefit was intended equally for all. But if in a will, a deviſe is limited to *children* by way of a remainder, or upon a contingency which in the contemplation of the teſtator is uncertain *when* it may take place, if it ever happens at all; there the ſame reaſon holds, why it ſhould not be confined to thoſe only who were alive at the time of making the will. Here, the deviſe is a remainder after two eſtates tail. Therefore we are clearly of opinion that all the grandchildren *in eſſe*, at the time when the deviſe veſted, were equally entitled to take; which in fact includes all who are before the court, for they were all alive at the death of *Richard*.

If either *John* or *Richard* had had a ſon living at their death, there would have been an end of the limitation over.

* *June* 23.

The certificate was in theſe words *: "Having heard counſel "on both ſides, and conſidered this caſe, a doubt occurred, whe- "ther the deviſe of the real *eſtate*, as it ſtands upon the *will* "*alone*, was *good*; and if it was coupled with the codicil, whe- "ther the abſolute property of the *perſonal eſtate* would not veſt "in

" in *John*: and, therefore, we directed notice to be given to the " heir at law of the teſtator, and the perſonal repreſentative or " next of kin to *John*, that they might be heard by counſel if " they pleaſed. But the cauſe having been poſtponed to this " term, and no counſel appearing for them, we have thought " proper to give our opinion upon the queſtion, as between " the grandchildren themſelves. And, as they were *all in being* " at the *death* of *Richard*, we think they were *all* equally en- " titled."

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REX *verſus* GRUNDON *et al'*.

Wedneſday, June 21ſt.

THIS was a ſpecial caſe reſerved upon an indictment againſt the defendant and others, for an aſſault upon *Charles Crawford*, Eſq; a *fellow-commoner* of *Queen's College* in the Univerſity of *Cambridge*, in turning him out of the garden belonging to the ſaid College.

Sentence of expulſion unappealed from, given in evidence on an indictment for aſſaulting a *fellow commoner* of Queen's College *Cambridge*, by turning him out of the college garden; and held *concluſive* for the defendant.

Caſe.—On the trial, evidence was offered on the part of the proſecutor, to ſhew the illegality of the ſeveral ſentences of expulſion of the proſecutor from the ſaid college, and of the confirmation of the ſaid ſentences; but of which confirmation no notice was given to the ſaid proſecutor.

If the court of King's Bench ſhould be of opinion that ſuch evidence was admiſſible on the trial of the ſaid indictment, then the parties on both ſides were to produce to the court, ſuch part of their ſtatutes or other inſtruments, as might be proper to ſupport or invalidate ſuch ſentences; that the ſaid court might judge of the legality or illegality of the ſaid ſentences, or either of them, for the ſaid proſecutor's expulſion from the ſaid college.

The queſtions reſerved for the opinion of the court were, *1ſt*. Whether ſuch evidence, as above ſtated, given on the trial of the ſaid indictment, was admiſſible or not. *2dly*, Whether, if ſuch evidence was admiſſible, the ſaid ſentences, or either, and which of them, were legal for the proſecutor's expulſion from the ſaid college.

The cauſe came on before the court laſt term, when Mr. *Jones* for the proſecutor had begun. But Lord *Manſfield* ſtopped him, ſaying, that upon the caſe, as then ſtated, nothing appeared to the court of the foundation of the college, or of their juriſ-

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diction, or of the ſtatutes, or of the facts; all of which were neceſſary to be ſtated to enable the court to form a judgment upon the queſtion reſerved. His Lordſhip ſaid, if the proſecutor were a *member* of the *foundation*, the ſentences might be concluſive until reverſed by the viſitor. If only an *independent* member, it might be defenſible in thoſe who had the management and direction of the college to put him out.

The caſe was now made compleat by the addition of the *order* of *ruſtication* of the proſecutor, dated *Auguſt* 21ſt, 1773, ſigned by the Maſter and *one* Fellow; the *ſentence* of *expulſion*, dated *September* 27th, 1773, made by the Maſter and *two* Fellows, but ſigned only by the Maſter; the *order* of *confirmation* of the ſame dated *January* 13th, 1774, ſigned by the *Maſter* and *ten* Fellows. Alſo a copy of the ſtatutes of the college, of which the ſtatute *de perendinantibus* only was material, and an interpretation of the words, "*Major pars ſociorum*," which occurred frequently in the ſtatutes, and which, by ſuch interpretation, was conſtrued to mean the *major part* of the Fellows *reſident* in college. The ſtatute *de perendinantibus* was as follows: "Statuimus quod "nullus ad *perendinandum* in hoc collegio admittatur, niſi de "expreſſo conſenſu preſidentis, et *majoris partis ſociorum*; quibus "conſtet de ipſius bonâ famâ converſationeque laudabili, et "quem crediderint quiete victurum inter ſocios. Et ſi oppoſi- "tum conſtiterit poſt ejus ingreſſum, primò admoneatur per pre- "ſidentem vel ejus vicegerentem; et ſi tunc non emendatur, mo- "neatur ſecundo per duos ſocios tunc domi preſentes; quod ſi "adhuc non ſe reformaverit, tertio per preſidentem et *majorem* "*partem ſociorum* expellatur a collegio in perpetuum. Quod ſi "quiſque perendinantium aliquod crimen committat unde ſcan- "dalum aut infamia eidem collegio oriatur idem ab hoc collegio "protinus expellatur."

Mr. *Jones* for the proſecutor propoſed to maintain, 1*ſt*, That the ſentence of expulſion was examinable in this court. 2*dly*, That it was irregular, and conſequently illegal.

Upon the *firſt* point: Colleges are ſocieties inſtituted, not merely for the purpoſe of diſturbing the founder's property, but, like all other corporations they have, for their object, the public utility. They may then be conſidered in two different capacities: 1. corporate; 2. eleemoſynary. In each of theſe characters, they are ſubject to a different juriſdiction. In matters which concern their public, their corporate character, they are controllable like every other

other corporate body, by the general law of this country: In matters which regard their private or eleemosynary character, their proceedings are examinable by persons appointed by the founder, their respective visitors. 1775. REX *versus* GRUNDON.

These institutions are in general composed, not only of members who participate of the endowment, but of others who do not. The latter, however, are considered strictly as members of the college. The terms of their admission, their rank, their habits, their privileges, their discipline and regulation, the causes for the censure or expulsion of them are defined and prescribed by the statutes, which form the general constitution of the college. In virtue of this relation, they claim to be members of the University, or aggregate Corporation composed of the members of the different colleges. In this character they are subject to further regulations, and in return receive essential advantages: they become entitled to different degrees, distinctions, and valuable privileges in the learned professions, and to a qualification as electors or representatives for the University in Parliament.

There is nothing which essentially differences the particular constitution of Queen's College from that of any other. It was first founded by *Margaret* of *Anjou*, queen of *Hen.* 6. and afterwards further endowed by *Elizabeth*, wife to *Ed.* 4. The foundation consists of a master, 19 fellows, and 8 scholars. Mr. *Crawford* the present prosecutor, claims no part of the endowment, but was duly admitted a member of the college.

If the sentence by which Mr. *Crawford* is deprived of the rights incidental to his character as a member of the college, be not examinable in this court, he is *without remedy*. For the province of the visitor is confined to cases in which the founder's property is concerned. This was settled in *Davison's* case*. It was there determined, that members of the prosecutor's description have no appeal to the visitor's jurisdiction, But it is sufficient that the proceeding is without redress in any other jurisdiction, to render it amenable to this court, which ever interposes to prevent a defect of justice to the subject. This principle is declared in the Great Charter, and expressly recognized in *Bagg's* case, 11 *Co.* 98. It was there resolved, "that to this court of "King's Bench belongs not only authority to correct errors in "judicial proceedings, but errors and misdemeanors likewise extrajudicial, tending to the breach and oppression of the subject, "or to raising any faction or debate, or any manner of misgo-"vernment;

* In Canc. 25th July, 1772.

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" vernment; *in order that no manner of wrong or injury, public* " *or private, may be done, but may be remedied by due courſe of* " *law.*"

This is the caſe of a corporation, inſtituted for the improvement of the public manners, by the inſtruction of youth, and the advancement of uſeful learning, exerciſing powers which are an emanation from this court. In this view it is clearly ſubject to the authority of this court, which is not only inveſted with a controlling power over all corporations, but is alſo the national *cuſtos morum*, the ſuperintending guardian of the public morals.

This court will, therefore, not conſider itſelf as precluded from an examination of this ſentence, and a declaration that it is irregular, if it ſhould be ſo found, which is all that the preſent caſe demands. For the queſtion in the preſent proceeding is ſimply, Whether the ſentence be really a regular ſentence of expulſion? If it is not, the defendants are guilty; if it is, they muſt be acquitted.

Second point. The ſentence is clearly irregular. The ſtatute *de perendinantibus*, which provides for the regulation of thoſe members of the college who are *independant* of the endowment, directs the mode of their admiſſion to, and expulſion from the college. For a very obvious reaſon, the ſame deſcription and number of perſons, which is requiſite to their admiſſion, is made neceſſary for their expulſion; the Maſter and the *major part* of the Fellows. Now this ſentence of expulſion is only by the Maſter and *one* Fellow; the ſecond ſentence, indeed, is by a Maſter and *two* Fellows, which evidently, however, do no not conſtitute a majority.

Mr. *Pemberton*, *contra*, for the defendant. *1ſt* Point. It is a general rule of law, that a ſentence or judgment of any court or authority, having competent juriſdiction, is concluſive until reverſed. *Carth.* 225. *Buller's Ni. Pri.* 244. 1 *Salk.* 290. *Blackham's* caſe. The propriety, therefore, of this ſentence of expulſion, could not be enquired into collaterally at *niſi prius* upon this indictment.

2d Point. The ſentence is a good and valid ſentence. As to the ſtatute *de perendinantibus*, a *fellow commoner* cannot be conſidered as a *perendinans*. But ſuppoſing he could, the interpretation of the ſtatutes is given to the Preſident and the major part of the Fellows: and the interpretation they have given to the term *major part*, is, that it means the majority of the Fellows *preſent* in college. Therefore this ſentence though ſigned by the

the Maſter and one Fellow only, being the only Fellow in college, is ſtrictly regular and legal. 1775.

Cur. adviſare vult. REX *verſus* GRUNDON.

Afterwards, on *Monday June* the 26th, Lord *Mansfield* delivered the opinion of the court. His Lordſhip ſtated the caſe at large, and proceeded thus:

The proſecutor, after theſe proceedings, continued by force, and in deſpite of the college, until *July*, when the fact for which the indictment is brought happened. But he had never before made any complaint about the proceedings, nor appealed to the viſitor. The queſtion upon theſe facts is, Whether, after the proceedings ſo had againſt him, he had a right to continue in the college? It has been argued, that he was a *mere boarder*; and if ſo, that he had no right to continue after the notice given him to leave the college; and we all think that he appears to be a *mere boarder*. Mr. *Jones* has furniſhed me with a caſe which ſeems deciſive as to this point, and is as follows:—*Ex parte John Daviſon*, Eſq; in Chancery at Lord *Apſley*'s houſe, *July* 25th, 1772. Mr. *John Daviſon* was admitted a *commoner* of Univerſity college in *Oxford*, and after having performed the greateſt part of his public exerciſes, and having kept all the terms, within one, requiſite for the purpoſe of taking the degree of Batchelor of Arts, he was expelled the ſaid college. *Daviſon's caſe*. *Commoner* of Univerſity College in *Oxford* is a mere boarder.

He preferred his petition to the Lord Chancellor as viſitor; Univerſity college being of royal foundation, and the petition ſtates—That Univerſity College was a foundation of King *Alfred*, *anno*, 872.—That by *charter*, the ſaid college doth now conſiſt of a *maſter*, 12 *fellows*, and *other* members.—That he was admitted according to the tenor of the charter; that he was expelled by the maſter and *five* fellows, which does not conſtitute one half of the fellows of the college.—The appellant, therefore, prayed, that the matter might be taken into conſideration; that the maſter and fellows might be ordered to attend; and that the charters, books, and ſtatutes might be inſpected and produced at the hearing of the petition; and, in general, that the appellant might be redreſſed. Petition. Prayer.

The Lord Chancellor ordered, that the parties ſhould attend, and that the public books, *&c. &c.* ſhould be inſpected. Upon this, the college preſented a counter-petition, ſuggeſting, that certain allegations in the appellant's petition are unſupported by evidence, particularly theſe:—"That the college now conſiſts by "*charter*, of a maſter, 12 fellows, and other members:—That "your Order 15th *April*, 1772. Croſs-petition.

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"your petitioner was admitted a member purſuant to the char-
"ter." Whereas they ſhew, that the college is a corporation by *preſcription*, though confirmed by ſeveral royal charters. That it is an *eleemoſynary corporation*, and conſiſts *only* of a *maſter* and 12 *fellows*: that they are adviſed, and do ſubmit that *commoners*, *i. e.* ſuch as pay for their lodging and diet, and are independant, *do not belong to the college*, nor are of the foundation: that they are, of courſe, not entitled to the protection of the viſitor, and can have no title to the production of the college papers. They

Prayer. therefore pray, that they may be heard againſt the petition of the ſaid *Daviſon*; and that ſo much of the above order as relates to the inſpection and production of the college books, *&c. &c.* may be ſuſpended, till it be determined "whether this be matter of "viſitatorial cognizance?"

Order *April* 30th. The Lord Chancellor accordingly ſuſpended that part of the order.—The maſter afterwards made an affidavit, that the college was *merely eleemoſynary*; that it had undergone various changes, till at laſt, Queen *Elizabeth*, in the 15th year of her reign, incorporated it "per nomen magiſtri et ſociorum collegii magnæ "aulæ univerſitat. *Oxon*;" that in the ſaid grant there is *no mention* of any *commoners*, or other perſons independant of the foundation, and that Mr. *Daviſon* never was a member of the ſociety, never belonged to the foundation in any ſenſe. The queſtion was, "Whether in a college *Independants* of the foundation "were of viſitatorial juriſdiction?"

On the part of the college it was argued, that the viſitor's juriſdiction is confined to the foundation, and is derived ſolely from the intention of the founder with reſpect to the diſtribution of his property. That independant members are pupils received into the college by the Maſter and Fellows, and ſubmitted to their diſcretionary government; they are ſtrangers to the foundation. They, therefore, have no other remedy in caſe of particular grievance, than that which the laws of the land afford them, they have no appeal in the viſitor's juriſdiction. The viſitor cannot give coſts, and young men of fortune may ruin, or at leaſt haraſs the univerſity by continual vexation.

On the part of the appellant it was inſiſted, that the viſitor's juriſdiction is not confined to the foundation, but compriſes the whole government of the college: that the independant members, though ſtrangers to the eleemoſynary conſtitution are not ſtrangers to the college, being recognized, deſcribed, and defined in the conſtitution of the univerſity. For by the univerſity ſtatutes,

tutes, a degree cannot be taken by a perſon not a member of a college. That the ſame ſtatutes enact the duties, privileges, ranks and habits of independent members, according to their ſeveral orders. That theſe deſcriptions and definitions are acknowledged by thoſe laws which affirm the conſtitution of the univerſity. That thoſe laws will imply, on the part of members admitted *intra mœnia ædis*, ſubmiſſion to the orders and ſtatutes of the ſociety, and on the part of the college, protection and redreſs. The relation, therefore, of theſe independent members to the college being legally recognized, definite, and certain, they have an appeal to the viſitor —The Lord Chancellor, with the advice of *De Grey*, Lord Chief Juſtice of the Common Pleas, and Mr. Baron *Adams*, diſmiſſed Mr. *Daviſon*'s petition. And upon examination of the original order, it does not appear that any mention is made of the petitioner having liberty to inſpect the books and charters, *&c.* of the college, in order to the diſcovery of any *corporate* right he might have.

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Petition diſmiſſed.

Now the order in that caſe is expreſsly founded upon the ground of the appellant being an independent member and a mere ſtranger. Here the proſecutor is an independent member; and if ſo, the authority I have juſt mentioned puts an end to the queſtion: Becauſe, as a *mere boarder*, he had no right to continue in the college after they had given him notice to quit. It may be ſaid there is a difference between that caſe and this, becauſe the ſtatutes of Univerſity College take no notice at all of independent members or ſtrangers; whereas there are expreſs proviſions and regulations in the ſtatutes of Queen's College concerning them. But ſuppoſing Mr. *Crawford* were ſubject to the rules and orders of the college; in that caſe it is inſiſted that the ſentence of expulſion is illegal: And at the trial, the ſtatutes of the college were offered in evidence to ſhew that it ſhould have been ſigned by the maſter and a *majority* of the fellows, whereas it was ſigned by the maſter and *one* fellow only. The anſwer to it is, that even if the allegation were well founded, the merits, the juſtice, or the regularity of the expulſion cannot be entered into at the aſſizes; but the proper mode of impeaching it, is by appeal to the viſitor. Mr. Juſtice *Willes* was of that opinion at the trial: but reſerved the queſtion, Whether the ſtatutes were to be admitted in evidence to impeach the ſentence, and enter into the validity of it there. And we are all of opinion with Mr. Juſtice *Willes*, that they could not. So that even if Mr. *Crawford* was a member, and ſubject to the juriſdiction, rules and orders

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of the college, his mode of redreſs is by appeal to the viſitor, and not to this court.

The king's courts, if the college do not exceed their juriſdiction, have no cognizance, no ſuperintendance. But the viſitor is the only perſon to be applied to, and moreover his judgment is final. He does not proceed by the rules and forms of the common law; but he ſuffers a party *allegare non allegata, et probare non probata;* and decides entirely upon the merits. Therefore this expulſion by the Maſter and reſident Fellows muſt be taken by every body to be a right ſentence till avoided or ſet aſide by the viſitor who is the ſole judge. So with reſpect to ſentences of the eccleſiaſtical court; the temporal courts muſt conſider them as final and concluſive until reverſed.

So in caſes within the juriſdiction of the Admiralty courts, their judgment is concluſive until reverſed.

In this caſe expulſion is a matter entirely of their own juriſdiction. The viſitor might have proceeded upon the contempt and miſbehaviour ſubſequent to the original offence. There is an end of all diſcipline, if this expulſion might be overturned by force and violence without taking the proper courſe of applying to the viſitor. Therefore we are all moſt clearly and ſtrongly of opinion, that Mr. Juſtice *Willes* did extremely right, in refuſing to admit any part of the ſtatutes to be read in evidence at the trial.

It is ſuggeſted to me, that if this were a common law right, like Doctor *Bentley*'s to a degree, it muſt be ſubmitted to until a proper application were made to a court of juſtice in a legal way. It cannot be overturned by force and violence. Therefore let there be,

Judgment for the defendant.

Friday, June 23d.

ENGLISH qui tam *verſus* COX.

MR. BULLER moved, that the proceedings in this caſe, which was an action on the ſtatute of uſury, might be ſtayed, until the coſts taxed on a *nonpros* in the cauſe wherein *Samuel Chadwick* was plaintiff, and the ſaid *William Cox* defendant (being 20 *l.*); were paid.

ASTON Juſtice. Though the court may, perhaps, in ſome caſes, have been off their guard, and may have granted a motion of this kind, it has always been refuſed, on conſideration; and the reaſon

ſon is, that the party is at liberty, if he pleaſes, to purſue the coſts of the former action; and cited a caſe of *Waring* v. *Potter*, which he ſaid was decided about a year and a half ago, in which the court denied a ſimilar motion. 1775.

ENGLISH *verſus* COX.

Per Cur. Take nothing by the motion.

REX *verſus* WILLIAM BOWER.

Friday, June 23d.

THE defendant, who was a *pawnbroker*, was indicted for making, and cauſing to be made, one gold watch chain, weighing fifteen pennyweights and nine grains, of worſe gold than it ought to be made: *to wit*, of gold no way agreeing with the ſtandard, but being according to the rate of twelve carats, and two grains in the pound weight Troy worſe than the ſtandard: and for that, he the ſaid *William Bower*, the ſaid gold chain ſo falſely made, &c. afterwards falſely and *knowingly*, to one *William Black*, did *expoſe to ſale*, and ſell AS AND FOR a thing *wholly made of gold, and agreeing with the* ſaid *ſtandard*, in contempt, &c.

Knowingly *expoſing to ſale*, and *ſelling* wrought gold *under* the *ſterling alloy, as and for* gold of the true *ſtandard weight*, which is *indictable* in *goldſmiths*, is a *private impoſition* only in a *common perſon*.

The indictment contained a ſecond count, which was word for word the ſame as the former, except that the former charged the defendant with *making and ſelling*, whereas the latter only charged him with *expoſing to ſale and ſelling* one other gold watch chain, &c. AS AND FOR a thing wholly made of gold agreeing with the ſtandard. The jury found the defendant *not* guilty on the *firſt* count; but *guilty* of the premiſes in the *ſecond* count.

Mr. *Dunning* had obtained a rule to ſhew cauſe why the judgment ſhould not be arreſted upon the ground of this not being an indictable offence, and alſo leave to move for a new trial, if the court ſhould be againſt arreſting the judgment.

Mr. *Wallace* and Mr. *Lucas* now ſhewed cauſe, and inſiſted that the offence as charged in the indictment was a *public* fraud and *cheat* in the courſe of the defendant's trade, and, therefore, indictable at common law, and cited *Tremaine*'s Entries. The *Queen* v. *Macarty et al.* 1 *Salk.* 286. 6 *Mod.* 301. 2 Lord *Raym.* 1179.

Mr. *Dunning contra* contended, that at the utmoſt, this was no more than a mere civil wrong, and, therefore not indictable. That as to its being a cheat, the indictment contained no ſuch charge, nor did it appear upon the evidence given at the trial,

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REX *verſus* BOWER.

that the defendant knew whether the chain was of the ſtandard weight or not. For the ſale was by his ſervant; who, upon being aſked by the plaintiff if it was real gold, anſwered in the affirmative that it was.

The queſtion, therefore is, Whether this ignorant miſrepreſentation of the ſervant is ſuch an offence as ſubjects the maſter to an indictment, and he inſiſted it was not.

Afterwards, on *Wedneſday*, *June* the 25th, Lord *Mansfield* reported the evidence as follows: The proſecutor ſwore that he bought the chain at the defendant's ſhop, of *Thomas Jones* the defendant's ſervant, and aſked him if it was real gold. He ſaid it was: That he carried it to be examined, when he found it to be under the ſtandard weight and not marked: Upon which he returned to the defendant's ſhop, and demanded his money back of the defendant, which the defendant refuſed to give him. I have taken in my note, that the defendant expoſed it to ſale, but have omitted the words, "*knowing*, *&c.*"—As to that, the knowing it to be under the ſtandard, is an inference of law; but the ſelling by his ſervant was certainly *his* expoſing it to ſale.

His lordſhip then proceeded thus: The queſtion is, Whether the expoſing wrought gold to ſale under the ſtandard, is indictable at common law? There are two precedents in *Tremaine's* Entries; one for making, the other barely for expoſing to ſale. The ſtatutes upon the ſubject relate only to goldſmiths.

It is certainly an impoſition; but I incline to think it is one of thoſe frauds only which a man's own common prudence ought to be ſufficient to guard him againſt, and which, therefore, is not indictable; but the party injured is left to his civil remedy.

ASTON Juſtice.—I rather think this is a private cheat. It is not ſelling *by falſe* meaſure, it is only ſelling *under* the ſtandard. Selling coals *under meaſure* is not an indictable offence, but ſelling them by *falſe* meaſure is *; and cited *Rex* v. *Lewis*. *Rex* v. *Wheatly*. *Hil.* 1 *Geo.* 3. *B. R.* Delivering *ſixteen* gallons of beer, as and for *eighteen*, held only a private fraud, and not indictable †, 2 *Burr.* 1125.

* Rex v. Driffield, *Hil.* 27 *Geo.* 2.

† Since reported alſo in *Blackſt. Rep.* 273.

WILLES Juſtice.—I am of the ſame opinion. The ſale in this caſe is not a ſale by falſe weight, or by falſe meaſure, but only of a watch chain of inferior value; and it is a favourable caſe; for it was the ſervant who ſold it, and not the maſter, though to be ſure the preſumption is, at the ſame time, that the maſter knew of it. *Rex* v. *Wilder*, *Mich.* 6 *Geo.* 1. *Rex* v. *Wheatley*, *Hil.* 1 *Geo.* 3. *Rex* verſus *Pinkney*, *Paſch.* 6 *Geo.* 2. I think

think it is within the reaſoning of thoſe caſes a private offence, and therefore not indictable. 1775.

Rule for arreſting the judgment abſolute.

REX *verſus* BOWER.

REX *verſus* FIELDHOUSE.

Tueſday, June 27th.

Indictment conſiſted of two counts; one for a *riot*, indorſed by the jury "*ignoramus*," the other for an *aſſault*, returned "*billa vera*," and held *good*.

MR. LUCAS moved, on the part of the proſecutor, to quaſh an indictment againſt the defendant, conſiſting of two counts; one for a *riot*, the other for an *aſſault*, and took this exception: that the grand jury had only found it a *true bill* as to the count for an aſſault, and indorſed *ignoramus* on the count for a riot; whereas they ſhould have found the whole to have been a true bill, or have rejected the indictment *in toto*: and cited 2 *Hawk. P. C.* 210. *Yelv.* 99, 100. *Rex* v. *Ford.* Rule to ſhew cauſe.

On *Saturday July* 1ſt, Mr. *Buller* ſhewed cauſe, and inſiſted that the doctrine as laid down in 2 *Hawk.* 210. did not apply to the caſe of different counts in the ſame indictment, which was the caſe here; but only to caſes where the jury find *billa vera* and *ignoramus* upon *different parts* of *one* and the ſame charge. Here the charges are two diſtinct charges; the jury find one to be well founded, the other not, which they may well do.

Mr. *Lucas*, contra, contended, that the finding of the jury in this caſe, was clearly bad; for the words of the indorſement do not make the indictment, but only evidence the aſſent or diſſent of the grand inqueſt. The bill itſelf is the indictment, when affirmed. But here, part only of the bill is affirmed; therefore the whole is void: and relied on the caſe of *Rex* v. *Ford*, *Yel.* 99. and 2 *Hawk.* 210, cited above.

ASTON Juſtice. This caſe certainly does not come within the doctrine of *Rex* v. *Ford*, and 2 *Hawk.* 210. That doctrine relates only to caſes where the grand jury take upon themſelves to find part of the ſame indictment to be true, and part falſe. In that caſe it is held that the whole is void; and the reaſon ſeems to be, becauſe the jury do not affirm the fact ſubmitted to their enquiry. But where there are two diſtinct counts, as in this caſe, the finding *billa vera*, as to *one* count only, and rejecting the *other*, leaves the indictment as to the count, which the jury affirm, juſt as if there had originally been only that *one* count. If you can take advantage of it any other way, you are at liberty to do ſo, but I think there is no reaſon to quaſh the indictment.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt concurred.*

Per. Cur. Rule diſcharged.

1775.

Wednesday, June 28th.

REX *verſus* Inhabitants of RINGWOOD.

On appeal from a poor's rate, becauſe particular perſons or particular property only is omitted in the rate; the ſeſſions ought not to quaſh the whole rate, but ſhould amend it in ſuch particulars.

Quære, If perſonal property is rateable?

MR. *Mansfield* laſt term obtained a rule to ſhew cauſe why an order of ſeſſions, quaſhing a rate made for the relief of the poor of the pariſh of *Ringwood*, in the county of *Southampton*, ſhould not be quaſhed, and why the ſaid rate ſhould not be confirmed.

The order of ſeſſions was made upon the appeal of *John Short*, one of the inhabitants. It was ſtated on the ſeſſions's order, that it appeared to them, that *John Newman*, *Stephen Junks*, and *Timothy Swetland* were poſſeſſed as copartners of *ſtock* in the *trade* and buſineſs of *common brewers* and maltſters in the ſaid pariſh of *Ringwood*, to the value of 4000 *l.* For no part of which the ſaid copartners, or either of them, were, or was in the ſaid rate aſſeſſed to the relief of the poor of the ſaid pariſh.—That the ſaid *John Newman*, *Stephen Junks*, and *Timothy Swetland*, were all, at the time of making the ſaid rate, and ſtill are *inhabitants* of the ſaid pariſh of *Ringwood*.—And it doth not appear to this court, that *ſtock in trade* hath *ever before been rated in the ſaid pariſh*.—Therefore, this court is of opinion, and doth adjudge that the ſaid recited rate ought to be quaſhed, and the ſame is hereby quaſhed accordingly. And this court doth hereby order a *new* rate to be made immediately for the relief of the poor of the ſaid pariſh, by the church-wardens and overſeers of the poor of the ſaid pariſh of *Ringwood*.

Mr. *Dunning* and Mr. *Burrough* ſhewed cauſe.—The queſtion is, Whether *perſonal* property is, or is not rateable by the ſtat. 43 *El. c.* 2.? That it is, is manifeſt from the words, "*by taxation* "*of every inhabitant, parſon, vicar*, and *other*;" for if they were rateable only in reſpect of their *land*, the ſubſequent words "every *occupier of lands, houſes*," &c. would be tautology and ſuperfluous. *Dalton's Juſtice, edit.* 1715. *c.* 73. *tit. Poor. Reſol.* to the 18th queſtion. This reſolution is recognized in 2 *Bulſtr.* 354. Sir *Anthony Earby*'s caſe, at *Lincoln* aſſizes, 11 *Mar.* 1633. 9 *Car.* 1. "It was ordered and ſettled by the judges of "aſſize, *Hutton*, and *Croke*, that aſſeſſments for the relief of the "poor, ought to be made in an equal manner upon the inhabit-"ants, according to their viſible eſtates, which they had and "enjoyed real and *perſonal*, in the place where they dwelt; and "that it had been ſo *decided by the judges of England*." In Lord *Raym.*

Raym. 1280. *Rex* v. Inhabitants of *Barking*, all four judges agreed and reſolved, that a *tradeſman*'s ſtock in trade was rateable to the poor rate, though they differed whether the ſtock of a *farmer* was ſo or not.—In *Rex* v. Guardians of the Poor of *Canterbury*, *Hil.* 9 *Geo. B. R. Rex* v. *Whitney*, *P.* 10 *Geo.* 3. *R. B.* and in a caſe from *Warwickſhire*, in all of which this queſtion came before the court, the court avoided ſaying that perſonal property was not rateable, and gave judgment on other ſufficient grounds which occurred.

1775. Rex verſus Inhabitants of RINGWOOD.

Mr. *Wallace*, Mr. *Manſfield*, and Mr. *Kerby contra.*—The order of ſeſſions ought to be quaſhed, 1ſt, Becauſe the juſtices have done wrong in quaſhing the whole rate, whereas they might and ought to have amended it under *ſtat.* 17 *Geo.* 2. *c.* 3. and ſo it was determined in *Rex* v. Inhabitants of *Whitney*. 2ndly, The order of ſeſſions has rated the *whole* ſtock in trade of the appellants below, who are brewers, without making any *allowance* for their debts; whereas perſonal property, if rateable at all, ought to be rated after all proper deductions; otherwiſe, the debts may exceed the value of the ſtock; and in fact in this caſe, moſt of the articles of the trader's ſtock, as malt and hops have been already taxed where they grew.

As to the authorities, Sir *Anthony Earby*'s caſe, 2 *Bulſtr.* 354. is inapplicable to the preſent caſe. The only queſtion there was, whether he was rateable in reſpect of *land out* of the pariſh: there was no queſtion about perſonal property.—The caſe in Lord *Raym.* 1281. related to ſtock upon a farm.

ASTON, Juſtice.—The queſtion was, Whether he was rateable for his hay and corn, which had paid before? It has never been decided that ſtock in trade is not rateable. Sir *Joſeph Yates*, in *Rex* v. Guardians of the Poor of *Canterbury*, did ſay ſomething like it, in the abſence of my Lord Chief Juſtice: but then it was ſaid, that if it was rateable, it muſt be a clear reſidue that is rated after all proper allowances and deductions.

Mr. *Wallace*, &c. As to the word "Inhabitants" in *ſtat.* 43 *El. c.* 2. upon which the argument has chiefly reſted, it was uſed only to diſtinguiſh perſons reſident in, and occupying lands and houſes within the pariſh, from thoſe who occupied lands, *&c.* but did not reſide in the pariſh. This interpretation is warranted by many authorities. In 5 *Co.* 67, *Jefferey*'s caſe, the court held he was ratable to the church as an inhabitant of the pariſh in reſpect of lands which he occupied therein, though he reſided elſewhere. 2 *Inſt.* 702. Lord *Coke*'s reading upon the *ſtat.* 22 *Hen.* 8. *c.* 5.

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c. 5. for the repair of bridges. And ſo in reſpect of the burthens impoſed by the ſtatutes of hue and cry, and for the repair of county gaols; all perſons occupying lands or houſes within the hundred or county, are held to be inhabitants, and liable to contribute, though they reſide out of it.

Lord MANSFIELD.—The court are not obliged to give an opinion upon every general queſtion, which the ſeſſions may think fit to bring before it. In general, I believe, neither here nor in any other part of the kingdom, is perſonal property taxed to the poor. But as to this particular caſe, I have no doubt what is to be done with it, as the authority of the *King* and the *Inhabitants* of *Whitney* is preciſely in point. I think the juſtices would not have done very wrong, if they had acquieſced in the practice which has obtained ever ſince the *ſtat.* 43 *Eliz.* of not rating this ſpecies of property. The caſe of the *King* and the Inhabitants of *Whitney*, was determined upon this ſingle ground; that the juſtices in ſeſſions ſhould not have quaſhed the whole rate, (which in caſes where it is not abſolutely neceſſary they are forbid to do by *ſtat.* 17 *Geo.* 2. *c.* 3. *ſect.* 6.) but ſhould have amended it, by inſerting the particular perſons, and that property which was omitted, and which they thought rateable. So here, the juſtices at ſeſſions ſhould have *amended* the rate, if they thought this property rateable; and then on attempting to do it, they would have diſcovered the wiſdom of conforming to the practice, which they expreſsly ſtate in the caſe, of not rating it. If they had tried to have amended it, how would they have rated this ſtock? Are the hops, and the malt, and the boiler to be rated at ſo much for each? Or, is the trader to be rated for the groſs ſum which his whole ſtock would ſell for? If the juſtices had conſidered, they would have found out the ſenſe of not rating it at all; eſpecially when it appears that mankind has, as it were, with one univerſal conſent, refrained from rating it; the difficulties attending it are too great, and ſo the juſtices would have found them. As to the authorities which have been cited, they are very looſe indeed; and even if they were leſs ſo, one would not pay them much deference, eſpecially as they differ; and the rules they lay down have not been carried into execution for upwards of 100 years. They talk of *viſible* property; what is *viſible* property? I confeſs I do not know what is meant by viſible property. If every viſible thing ſhould be determined to come under that deſcription, in that caſe a leaſe for years, a watch in a man's pocket would be rateable. Viſible property is ſomething local in the place where a man

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man inhabits. But that does not decide what a man's perſonal property is. Conſider how many tradeſmen depend upon *oſtenſible* property only.

As to the caſe in Lord *Raym.* 1280, the *only* queſtion ſubmitted to the court was, Whether the ſtock of a *farmer* was rateable to the poor? and they held it was not. But according to the report, they go on and ſay, the *ſtock* of an *artificer* is rateable: They had no caſe before them as to that point, therefore, the judgment upon that queſtion is extrajudicial. But ſuppoſing it were not, what do they mean by the viſible ſtock of an artificer? Some artificers have a conſiderable ſtock in trade; ſome have only a little; others none at all. Shall the tools of a carpenter be called his ſtock in trade, and as ſuch be rated? A taylor has no ſtock in trade, a butcher has none; a ſhoemaker has a great deal. Shall the taylor, whoſe profit is conſiderably greater than that of the ſhoemaker, be untaxed, and the ſhoemaker taxed?—Under the land tax act in *London*, to avoid inconveniences they tax the *houſe* in which a perſon lives at a certain ſum, by gueſs: and to avoid diſcovering a man's ſtock they tax it at random. Inſomuch that I have known a houſe occupied by a phyſician, taxed the ſame as when a merchant had it. But what I ground my opinion on in the preſent caſe is, that it is exactly like the caſe of *Rex* v. The Inhabitants of *Whitney*, where the court quaſhed the order of ſeſſions, becauſe they had quaſhed the whole rate inſtead of amending it: and, therefore, I am clearly of opinion, that the rule for quaſhing the order of ſeſſions ſhould be made abſolute.

ASTON, Juſtice.—There has been no deciſion that perſonal property is rateable: all the opinions upon the ſubject are only *dicta* of judges. Lord *Hale* ſays, the *uſage* has been *againſt* rating perſonal property, and that the inconveniences attending it would be very great. In *Ringwood* it never has been rated. The three caſes that have been relied on are very looſe. But this caſe is juſt like the *Whitney* caſe. There the juſtices quaſhed the whole rate inſtead of amending it. So the juſtices have done here. If they had amended it as they ought to have done, they would in the attempt to make a better rate have found the difficulty of rating perſonal property.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

Per Cur. Order of Seſſions quaſhed.

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Monday, July 3d.

CATON *verſus* BURTON.

Prohibition denied, where the matter of ſuggeſtion is *debors* the proceedings; unleſs verified by affidavit.

MR. *Buller* had obtained a rule to ſhew cauſe, why a prohibition ſhould not go to the Admiralty Court, in a ſuit for an aſſault upon the high ſeas, upon a ſuggeſtion, that the cauſe of action aroſe, if any where, in the body of a county, *viz.* at *Dover* in the *county of Kent*, and *not* on the *high ſeas;* upon the authority of a caſe in *Moore*, 89. which was a libel in nature of a detinue at common law, for a ſhip lying at anchor at *Limehouſe;* and becauſe *Limehouſe* was *infra corpus comitat.* a prohibition was granted.

Mr. *Mansfield* now ſhewed cauſe and inſiſted, 1ſt. That as the defendant had pleaded to the merits in the *Admiralty* Court, a prohibition ought not to go, becauſe the want of juriſdiction alleged by the ſuggeſtion, did not appear upon the face of the libel; and ſo it was expreſsly held in 2 *Brownl.* 30, *Jennins* v. *Audley.* 2dly. That there ought to have been an affidavit verifying the truth of the ſuggeſtion; whereas, it was only ſworn by a clerk, who had merely copied the proceedings, that he believed the ſuggeſtions were true. 1 *P. Wms.* 476. 2 *Salk.* 549.

Mr. *Wallace* and Mr. *Buller*, *contra*, contended, that there was no need of an affidavit, verifying the ſuggeſtion in this caſe; becauſe it was not inconſiſtent with the negative plea below to the aſſault; and that the defendant's plea to the merits could make no difference; becauſe a party cannot by his own conſent give a court a juriſdiction which has it not: but even if the defendant had pleaded the matter in the ſuggeſtion, to the juriſdiction of the Court of *Admiralty*, that court could not have been permitted to try it.

ASTON, Juſtice, mentioned the caſe of *Theyer* v. *Eaſtwick*, *Hil.* 7 *Geo.* 3.* which was a prohibition to the *Conſiſtory* Court of *London*, in a ſuit of defamation for calling the plaintiff a whore in *London*, upon a ſuggeſtion, that it was puniſhable at common law by the *cuſtom* of *London*. And the court held an affidavit of the cuſtom was neceſſary. He mentioned alſo the caſes of *Hynes* v. *Thomſon*, *Mich.* 1738, 12 *Geo.* 2. *B. R. Driver et Uxor* v. *Colgate*, *Hil.* 1738, 12 *Geo.* 2. in *B. R.* and *Buggin* v. *Bennet*, *Pach.* 7 *Geo.* 3. *B. R.* † in which latter caſe, he ſaid, the three former were alluded to, and relied on by the court in their judgment.

* 4 *Bur.* 2032.

† 4 *Bur.* 2035.

Lord MANSFIELD.—The reaſon in thoſe caſes is deciſive, namely, that the party ſhall not ſtop the proceedings of a Court of Juſtice, upon a mere ſuggeſtion without an affidavit. 1775.

CATON *verſus* BURTON.

Per Cur. Prohibition denied.

REX *verſus* MARGARET CAROLINE RUDD, widow.

Monday, July 3d.

UPON a *Habeas Corpus*, directed to the keeper of *Newgate*, he made the following return;

1ſt. A commitment of the defendant by an order made at the *Juſtice Hall*, in the *Old Bailey*, on the firſt of *June* 1775; for that it appears to them, upon the teſtimony of *Robert Drummond* and *Henry Drummond*, Eſqrs. who were examined as witneſſes on the trial of *Robert Perreau*, on an indictment for felony and forgery; "That ſhe did feloniouſly and falſely, make, "forge, and counterfeit a certain paper writing, purporting to "be the bond of *William Adair*, Eſq. for the payment of the "ſum of 7500*l.* with intention to defraud the ſaid *William* "*Adair*, againſt the form of the ſtatute in ſuch caſe made and "provided:" Wherefore they order her to be committed to the cuſtody of the keeper of *Newgate*, to anſwer all ſuch matters and things, as on his Majeſty's behalf ſhall be objected againſt her, touching the ſaid felony and forgery; there to remain in ſafe cuſtody until ſhe ſhall be diſcharged by due courſe of law.

2*dly*. A detainer by virtue of another order made at a further adjournment of the ſame ſeſſion of gaol delivery of *Newgate*, on the 7th of *June* 1775; ſhe being then at the bar of the ſaid Court, and charged upon the oath of Sir *Thomas Frankland*, Baronet, with having feloniouſly and falſely, made, forged, and counterfeited two certain paper writings, purporting to be the bonds of *William Adair*, Eſq. one for the payment of the ſum of 6000*l.* and the other for the payment of the ſum of 5300*l.* with intention to defraud the ſaid Sir *Thomas Frankland*, Baronet, againſt the form of the ſtatute, in ſuch caſes made and provided; to remain in *Newgate* until the next delivery of the King's gaol in *Newgate*, to be holden for the ſaid county of *Middleſex*, to anſwer all ſuch matters and things as ſhall be objected againſt her on his Majeſty's behalf, touching the ſaid felonies and forgeries; and until ſhe ſhall be diſcharged by due courſe of law.

Upon this return being read, Mr. *Davenport* moved to bail the defendant, relying chiefly on the circumſtance of her having been

An accomplice, who in a caſe out of the ſtatutes, is under the *practice* allowed, admitted by the juſtices of peace, as a witneſs, and is afterwards proſecuted; has only a claim to the mercy of the crown, founded on an expreſs or implied promiſe of the magiſtrate, on a condition performed; and it depends on his conduct in *fully* and fairly diſcloſing the joint guilt of himſelf and his companions whether the court will admit him to bail, that he may apply for a pardon.

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been admitted, and even examined as a king's evidence againſt the *Perreaus*.

Mr. *Wallace*, on the part of the proſecutor oppoſed it: When the Court adjourned the conſideration of it till the next morning.

The next day the return was read again; the keeper of *Newgate* having received a freſh warrant of detainer againſt her, *viz.* A detainer in his cuſtody, by virtue of a warrant under the hand and ſeal of *Sampſon Wright*, Eſq. a juſtice of peace for *Middleſex*, ſhe being charged before him, upon the oath of *Henrietta Alice Perreau*, for feloniouſly uttering and publiſhing as true, well knowing the ſame to be falſe, forged, and counterfeited, a certain bond for the payment of 5300 *l.* payable to *Robert Perreau*, ſigned *William Adair*, witneſſes, *Arthur Jones* and *Thomas Sturt*, with intention to defraud the ſaid *William Adair*, againſt the ſtatute, *&c.* and her ſafely to keep in his ſaid cuſtody until ſhe ſhould be diſcharged by due courſe of law. Dated the 3d of *July* 1775.

On the part of the defendant, an affidavit from three juſtices (Sir *John Fielding*, *Sampſon Wright*, and *William Addington*, Eſqrs.) was produced, in which it was ſworn, that they admitted her as a *general* witneſs for the crown, as to *all* the forgeries: That upon her own confeſſion ſhe acknowledged herſelf a *particeps criminis* in the forgery of the bond of 7500 *l.* but denied having any knowledge of or concern in any of the other bonds.

Mr. *Wallace*, Mr. *Lucas*, and Mr. *Howorth*, who ſhewed cauſe againſt admitting her to bail, objected, that the juſtices had no power to admit an accomplice in *forgery* as a witneſs, under the ſtat. 10 and 11 *Wil.* III. *c.* 23. or 5 *Ann. c.* 31. forgery not being one of the offences enumerated in thoſe ſtatutes. 2*dly*, Suppoſing forgery were an offence within thoſe ſtatutes, the confeſſion of the defendant went no further than the bond for 7500 *l.* and was ſilent as to the other two: Therefore, not having complied with the condition which the ſtatute impoſes, of making a full diſcloſure and diſcovery of all ſhe knew, ſhe was not entitled to any favour or protection in reſpect of the other two bonds.

Mr. *Davenport contra* for the defendant. Whether the juſtices have or have not ſtrictly purſued the proviſions of the different acts of parliament in this caſe, is not ſo much the queſtion upon the application now before the court, as whether the defendant

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defendant has or has not, under the faith and confidence ſhe repoſed in them, taking it for granted they were perfectly acquainted with the duty of their office, made ſuch a diſcloſure and diſcovery of every thing ſhe knows relative to the crimes with which ſhe is charged, as led them to admit her a King's evidence, and taught her to believe ſhe would be entitled to the privilege and protection which the law holds forth to all perſons in her ſituation. Moſt undoubtedly ſhe would have been totally ſilent upon the ſubject, if the hope and expectation, and even promiſe of a pardon had not been held out as an inducement to her to make the confeſſion ſhe has made. Therefore, to deprive her of the means of obtaining that pardon, is to have deceived, and drawn her in, under the colour and pretence of a judicial authority and power of protection, to diſcloſe what ſhe was not bound to diſcover, and to make her the deluded inſtrument of her own conviction. However irregular, therefore, the proceedings of the juſtices may have been, the court will not countenance the objections made to the preſent application, which are founded in nothing leſs than a breach of public faith. He alſo urged the circumſtances of the defendant's health, being ſuch as might, in all probability, be endangered by the confinement, if ſhe was to be remanded.

Lord MANSFIELD.—It appears by the return to this writ, that the priſoner is detained in cuſtody, by two orders of the court of ſeſſions and gaol delivery at the *Old Bailey*, for the forgery of two ſeveral bonds. It appears alſo, that ſhe is further detained by a warrant from a juſtice of peace for uttering one of theſe bonds knowing it to be forged: Therefore, though this court has undoubtedly a diſcretionary power to bail in *all* caſes *whatſoever*, yet as the ſeſſions are ſo near, and the offence committed by the priſoner of ſuch a magnitude as that of repeated forgery, there is no colour for the preſent application upon the ground of that general diſcretion. As to the next allegation, that her ſtate of health is ſuch as to be endangered by the confinement, it is not of *itſelf* a ſufficient circumſtance, in ſuch a caſe, to induce the court to interpoſe in her behalf.

A third ground which has been urged in ſupport of the preſent application is this: That the priſoner has been drawn in by promiſes and aſſurances, to anſwer to an examination, and to ſwear to it on oath, which ſhe would not have done, but from a confidence, that thoſe promiſes and aſſurances would have been kept and performed.

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The inſtance has frequently happened, of perſons having made confeſſions under threats or promiſes: The conſequence as frequently has been, that ſuch examinations and confeſſions have not been made uſe of againſt them on their trial. But it has been urged, that the priſoner in this caſe, is an *accomplice* who has been *admitted* to give *evidence*; that ſhe has already given evidence, and is further ready to give evidence to convict her partners in the buſineſs; and therefore, that ſhe is entitled by law to the King's pardon, and to a pardon which would operate in bar of her own crime. If ſhe had ſuch a right, we ſhould be bound *ex debito juſtitiæ* to bail her. If ſhe had not ſuch legal right, but yet came under circumſtances ſufficient to warrant the court in ſaying, that ſhe had a title of recommendation to the king for a pardon, we ſhould bail her for the purpoſe of giving her an opportunity of applying for ſuch pardon.

There are *three* ways in law and practice, which give accomplices a right to a pardon; and there is *one* mode, which entitles them to a *recommendation* to the king's mercy.

The three legal ways are *firſt*, in the caſe of *approvement*, which ſtill remains a part of the common law, though, by long diſcontinuance, the practice of admitting perſons to be approvers is now grown into diſuſe. *Secondly*, the caſe of perſons who come within the ſtatutes 10 and 11 of *Will.* 3. *c.* 23. *ſect.* 5. and 5 *Ann. c.* 31. *ſect.* 4. And *thirdly*, the caſe of perſons to whom the king has, by ſpecial proclamation in the Gazette or otherwiſe, promiſed his pardon.

Approvers have a right to a pardon, perſons within the ſtatutes of *William* and *Anne*, have a right to a pardon, and the other claſs of offenders who come in under the royal faith and promiſe, have a right to a pardon; and in all theſe caſes the court will bail them, in order to give them an opportunity of applying for a pardon.

There is beſides a *practice*, which indeed does not give a legal right; and that is, where accomplices having made a full and fair confeſſion of the whole truth, are in conſequence thereof admitted evidence for the crown, and that evidence is afterwards made uſe of to convict the other offenders. If in that caſe they act fairly and openly, and diſcover the whole truth, though they are not entitled *of right* to a pardon, yet the *uſage*, the lenity, and the practice of the court is, to ſtop the proſecution againſt them, and they have an equitable title to a recommendation for the king's mercy.

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The ſtatutes of *William* and *Anne* are to be laid out of this caſe, 1ſt, becauſe they are confined to the diſcovery of particular offences only, of which forgery is not one; ſecondly, becauſe they relate only to perſons who are at large; beſides which, to entitle themſelves to a pardon, they muſt actually *convict* two offenders at leaſt. For if their confeſſion be ſuch on their trial, as the jury gives no credit to, they are liable to proſecution. Theſe ſtatutes are therefore quite foreign to the preſent caſe, as are likewiſe all promiſes of pardon from the crown by proclamation.

There remains, therefore, only the equitable practice which gives a title to recommendation to the mercy of the crown.

The law of approvement (in analogy to which this other practice has been adopted, and ſo modelled as to be received with more latitude,) is ſtill in force, and is very material.

A perſon deſiring to be an approver, muſt be one *indicted* of the offence, and *in cuſtody* on that indictment: He muſt confeſs himſelf guilty of the offence, and *deſire* to accuſe his accomplices: He muſt likewiſe upon oath diſcover, not only the particular offence for which he is indicted; but *all treaſons* and *felonies* which he *knows of*; and after all this, it is in the diſcretion of the court, whether they will aſſign him a coroner, and admit him to be an approver or not: For if, on his confeſſion it appears, that he is a *principal*, and tempted the others, the court may refuſe and reject him as an approver. When he is admitted as ſuch, it muſt appear that what he has diſcovered is true; and that he has diſcovered the *whole truth*. For this purpoſe, the coroner puts his appeal into form; and when the priſoner returns into court, he muſt repeat his appeal, without any help from the court, or from any by-ſtander. And the law is ſo nice, that if he *vary* in a *ſingle circumſtance*, the whole falls to the ground, and he is condemned to be hanged; if he *fail* in the colour of a *horſe*, or in circumſtances of time, ſo rigorous is the law, that he is condemned to be hanged; much more, if he fail in eſſentials. The ſame conſequences follow if he does not diſcover the *whole truth*: And in all theſe caſes the approver is convicted on his own confeſſion. See this doctrine more at large in *Hale's Pleas Crown, vol.* 2. *page* 226 *to* 236. *Staunf. Pl. Crown, lib.* 2. *c.* 52. *to c.* 58. 3 *Inſt.* 129.—A further rigorous circumſtance is, that it is neceſſary to the approver's own ſafety, that the jury ſhould believe him; for if the partners in his crime are not convicted, the approver himſelf is executed.

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Great inconvenience aroſe out of this practice of approvement. —No doubt, if it was not abſolutely neceſſary for the execution of the law againſt notorious offenders, that accomplices ſhould be received as witneſſes, the practice is liable to many objections. And though, under this practice, they are clearly competent witneſſes, their ſingle teſtimony alone is ſeldom of ſufficient weight with a jury to convict the offenders; it being ſo ſtrong a temptation to a man to commit perjury, if by accuſing another he can eſcape himſelf.

Let us ſee what has come in the room of this practice of approvement. A kind of *hope*, that accomplices, who behave fairly and diſcloſe the whole truth, and bring others to juſtice, ſhould themſelves eſcape puniſhment, and be pardoned. This is in the nature of a recommendation to mercy. But no authority is given to a juſtice of the peace to pardon an offender, and to tell him he ſhall be a witneſs againſt others. The accomplice is not aſſured of his pardon; but gives his evidence in *vinculis*, in cuſtody: And it depends on the title he has from his behaviour, whether he ſhall be pardoned or executed. A juſtice has no authority to ſelect whom he pleaſes to pardon or proſecute, and the proſecutor himſelf has even a leſs power or rather pretence to ſelect than the juſtice of peace.

It reſts therefore on *uſage*, and on the offender's own good behaviour, whether he ſhall be proſecuted or not. And if, in a proper caſe, an application was to be made to this court, by an accomplice to be bailed; that is, in the caſe of a perſon properly within the uſage, and who has fully complied with the requiſite conditions, I ſhould have no difficulty in bailing him, in order that he might apply for the King's pardon.

I am apprized of the caſe of an accomplice upon a trial before Mr. *Juſtice Gould*, the circumſtances of which were as follows: An accomplice made a fair and full diſcovery to the ſatisfaction of Mr. *Juſtice Gould*, who tried the other offenders. The other witneſſes who were called upon the trial proved the identity of the accomplice by the deſcription of his perſon, but failed as to the identity of the other offenders: And the jury, becauſe they doubted of the guilt of the others, acquitted them. The counſel on the part of the proſecution then contended that the accomplice ought to be tried: but Mr. *Juſtice Gould*, under the circumſtances of the caſe, was of a contrary opinion, and I think very rightly.

Theſe being the general rules, let us ſee how far the preſent caſe is applicable to them, or in any degree falls within the rea-

ſon of them. A bond is detected to have been forged: three perſons are apprehended on ſuſpicion; the two *Perreaus* and the priſoner. The juſtices by their affidavit ſay, they admitted the priſoner as an evidence againſt the *Perreaus*, and ſwear they conſidered her as an accomplice: and they ſay they told her, "that if ſhe would ſpeak the truth, and the *whole truth*, not "only in reſpect of the bond in queſtion, but of *all the other* "*forgeries*, that then ſhe ſhould be *ſafe*; if not ſhe would be "proſecuted:" and the truth is, that, in point of law, ſhe was liable to be proſecuted for all. 1775. REX *verſus* RUDD

What is the diſcloſure ſhe makes? It is this: "That *Daniel* "*Perreau* came with a knife to her throat, and threatened to kill "her if ſhe did not forge *one* of the bonds in queſtion: that "under the terror of death ſhe forged it; and that *Robert Perreau* "brought the bond before ready filled up." On this information ſhe is no accomplice; ſhe has confeſſed no guilt, if the fact is true that ſhe was under the fear of immediate death; for it is the will that conſtitutes a crime. She comes, therefore, in the character of a perſon injured, in the character of one to whom this violence has been done. Inſtead of being a party offending, ſhe is a party *offended* as much as a man who has been robbed on the highway.—Farther, the juſtices do no treat her as an accomplice; for they ought to have kept her in cuſtody if ſhe had been an accomplice; but they diſcharged her, and they did right, there being no charge againſt her. But ſtill they ſay in their affidavit, they did conſider her as an accomplice. Suppoſe they did really think her guilty, ſhe is not the more or leſs on that account an accomplice. But what is moſt material is, that her information is flatly contradicted by herſelf; for on a voluntary confeſſion of her own, ſhe took the whole guilt upon herſelf, ſaid that ſhe alone forged the bond for 7,500*l.* and that *Robert Perreau* was an innocent man. If the juſtices had known of this confeſſion, they could not have admitted her as an evidence: becauſe by that confeſſion ſhe makes herſelf not only a *principal*, but the *only* perſon guilty.

One of the bonds for which ſhe is now detained, is dated three months prior to the bond in which *Robert Perreau* was concerned. Of this bond ſhe is totally ſilent, and denies any knowledge of the other two. Her information is therefore falſe, and the conditions offered to her by the juſtices not complied with.—I agree with Mr. *Davenport*, that if ſhe had made a fair and full diſcloſure of all that ſhe knew, and the juſtices had deceived her,

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under a promiſe or aſſurance or hope of pardon from them, ſhe would be entitled to a recommendation to mercy: and in that caſe I ſhould have been of opinion to bail her, though the juſtices had in ſtrictneſs no right to make ſuch a promiſe, or give her ſuch aſſurance. If any evidence or confeſſion has been extorted from her, it will be of no prejudice to her on the trial.

The three other judges concurred.

Per cur. let her be remanded.

Afterwards, at the gaol delivery held at the Old Bailey, in *September* 1775, before *Gould* and *Aſhhurſt* juſtices, and *Hotham* Baron; upon the defendant being brought to the bar to plead to ſeveral indictments for forgery found againſt her, the ſame objections were made as to the propriety of putting her upon her trial; and the judges differing in opinion, it was poſtponed, that the opinion of all the judges might be taken. Accordingly the enſuing gaol delivery on *Wedneſday* the 6th of *December* 1775, held before *Aſton* Juſtice, and *Burland* Baron; *Aſton* Juſtice, upon the defendant being brought to the bar, delivered the opinion of the judges as follows:

Margaret Caroline Rudd, at the laſt *September* ſeſſion, upon your being brought to the bar, to plead to ſeveral indictments found againſt you for forgery, it was inſiſted upon by your counſel, that, in point of law, you ought not to be put upon your trial at all; as you had confeſſed yourſelf to be an accomplice before the juſtices of the peace for the county of *Middleſex*, and had been by them admitted as an evidence for the crown againſt your companions in guilt, *Robert* and *Daniel Perreau*. The ground of that claim was founded upon the ſuppoſed merit of the diſcovery you had made: that being admitted to give evidence as an accomplice, and having performed your engagement to the public, by being examined before the grand jury, and being ready to have given evidence upon the trial, if called upon, you was entitled to a pardon, or not to have been proſecuted, that you might have time to apply elſewhere: that the conſtant practice in regard to accomplices becoming the King's evidence, was, that they ſhould not be proſecuted for the offence they had confeſſed, or ſuch like offences: that a contrary conduct would be a breach of faith with *you*, and would diſcourage the future diſcovery of criminals, if after ſuch diſcloſure they were nevertheleſs to undergo proſecutions for their offences. To this it was anſwered, that the diſcovery meant by law or practice to entitle an accomplice to favour, muſt be a full, ample and true diſcovery; and that it would never

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never discourage the making such discoveries, if criminals offering themselves as witnesses, were made to understand, that to entitle themselves to mercy or favour, they are to make a full discovery of all the offences about which they were questioned, and of all their accomplices in guilt. And it was farther insisted, that you had not made a *fair* disclosure, at the time of your examination, of *all* you knew relative to the forgeries which had been committed and published; but that you stood charged by the grand jury with several *other* forgeries which you had *denied the knowledge of*. Upon the debate of this matter before the bench of gaol delivery, the judges present not all concurring in one opinion, and it being judged a point of great weight and importance in the criminal law, fit to be fully considered and finally settled, how far, under what circumstances, and in what manner, an accomplice received as a witness, ought to be entitled to favour and mercy; the farther consideration of the matter was then deferred, in order that the opinion of all the judges might be taken upon the point of law.

Eleven of the judges have accordingly met, the Lord Chief Justice of the *Common Pleas* being absent through indisposition; and have mutually and deliberately considered of the matter, under all the circumstances, and it falls to my share to deliver in your presence, to the public, the substance of their reasons upon the occasion, that the ground of their resolves may be rightly understood. *All* the judges were of opinion, that in cases not within any statute, an accomplice, who fully and truly discloses the joint guilt of himself and of his companions, and truly answers all questions that are put to him, and is admitted by justices of the peace as a witness against his companions, and who, when called upon, does give evidence accordingly, and appears under all the circumstances of the case to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be prosecuted for his own guilt so disclosed by him, nor, perhaps, for any other offence of the same kind, which he may accidentally, and without any bad design, have omitted in his confession. But he cannot by law plead this in bar to any indictment against him, nor avail himself of it upon his trial; for it is merely an equitable claim to the mercy of the crown, from the magistrates express or implied promise of an indemnity, upon certain conditions that have been performed: it can only come before the court by way of application to put off the trial, in order to give the prisoner time to

In cases out of the statutes, an accomplice *fully* and fairly *disclosing* the joint guilt of himself and his companions and who is admitted a a witness and does give evidence, ought not to be prosecuted for his own guilt so disclosed; nor *perhaps*, for any other offence *accidentally* omitted by him.

But if prosecuted, he cannot plead this in bar, nor avail himself of it upon his trial. But he may apply to the court to put off the trial, that he may have time to apply for a pardon.

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apply elſewhere.—*Nine* of the eleven judges were of opinion, that *all the circumſtances* relative to a priſoner's claim of indemnity, in ſuch a caſe, not only may, but *ought* to be laid before the court, to enable them to exerciſe their diſcretion, whether, upon the grounds before them, the trial ſhould be put off, and conſequently have intimation given that the priſoner ought not to be proſecuted. For the *diſcretionary* power exerciſed by the *juſtices* of peace in admitting accomplices to be witneſſes, founded in *practice only*, cannot controul the authority of the court of *gaol delivery*, and exempt at all events the accomplice from being proſecuted. Upon every motion made, upon collateral equitable grounds, the court will ſee and examine into the *whole truth*, and conſequently ought to be informed of all the circumſtances affecting the caſe.

The affidavit of the juſtices, therefore, muſt in this caſe be neceſſarily taken into conſideration, to ſee upon what ground they admitted the priſoner as a witneſs. For if the court looked no further than the priſoner's own information in the preſent caſe, they could not have learnt from thence that ſhe had ever been conſidered as an accomplice at all; and as ſuch had been admitted as a witneſs againſt the *Perreaus* in either of the proſecutions. Upon their affidavit it appears that the public faith was not engaged but *conditionally*; and that there was an expreſs admonition given to the priſoner, not to conceal *any part* of the truth.

The ſame *nine* judges alſo were of opinion, that if the matter ſtood ſingly upon the two informations of the priſoner compared with the indictments againſt her, that ſhe ought to have been tried upon *all* or *any of* them: for from the priſoner's information ſhe is *no accomplice*; ſhe has not confeſſed herſelf guilty of any offence at all. By her repreſentation the ſhare ſhe has had in theſe tranſactions is perfectly innocent; but ſhe exhibits a charge againſt *Robert* and *Daniel Perreau*, the one ſoliciting her to imitate the hand of *William Adair* from a paper he produces; the other forcing her to do the act of forgery, under the threat and fear of death. Her two informations are contradictory; and every indictment that is preferred againſt her, proceeds upon a falſification of the account ſhe has given; for ſhe anſwers to the juſtices' interrogation, that *ſhe does not know of any other forgeries*: ſo ſhe does not confeſs, make any diſcovery, or become a witneſs concerning theſe offences; and if ſhe has ſuppreſſed the truth, and not made a full and fair diſcloſure, ſhe forfeits all equitable claim to favour and mercy. But if ſhe has

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has *told the truth, and the whole truth*, ſhe cannot be convicted. On the other hand, taking the affidavit of the juſtices, and all the caſe into conſideration, if ſhe is guilty of the charge contained in the indictments preferred by Sir *Thomas Frankland*, the judges are of opinion, as her informations before the juſtices have no relation to theſe charges, they can in no light be applied to mitigate her offences.

Upon the whole, whether the priſoner is guilty or not guilty, is a fact ſtill to be tried by a jury upon legal evidence only, without prejudice to the priſoner from any thing which has been inſiſted upon in point of law by her counſel to exempt her from any trial at all. For it would be hard indeed upon the ſubject, who has a right to advice and aſſiſtance of counſel in all matters and points of law that may ariſe upon his caſe, if the eventual deciſion of the court againſt the points of law inſiſted upon in his behalf, ſhould prejudice the ſubſequent trial of the facts, which is ultimately to be governed by the rules of evidence, and to be decided by the verdict of the jury. I hope and truſt the facts will be tried without the leaſt attention to, or even a remembrance of, any one matter or thing whatever, which has either made its appearance in print, or been the ſubject of common converſation.—I ſhall only add, that an accomplice, who deſires his trial may be put off, that he may apply for mercy under all the moſt regular pretenſions before laid down, *confeſſes the guilt*. But under the circumſtances of this caſe, if the priſoner confeſſes the offences charged in theſe indictments, ſhe has no *promiſe* of *mercy*, and no *claim* to favour for the reaſons aforeſaid.

The judges, therefore, are of opinion, that the trial ought to proceed; and I have authority to ſay, that the Lord Chief Juſtice of the *Common Pleas* concurs in that opinion.

N. B. The jury brought in their verdict as follows: "not "guilty, according to the evidence before us."

HOLMAN *et al'. verſus* JOHNSON, *alias* NEWLAND.

Wedneſday, July 5th.

ASSUMPSIT for goods ſold and delivered: Plea *non aſſumpſit* and verdict for the plaintiff. Upon a rule to ſhew cauſe why a new trial ſhould not be granted, Lord *Mansfield* reported the caſe, which was ſhortly this: The plaintiff who was reſident at, and an inhabitant of, *Dunkirk*, together with his partner,

Action lies for goods ſold *abroad*, which are *prohibited here*, if the *delivery* of them be *compleate abroad*; tho' the vendor knows they are to be run into *England*.

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partner, a native of that place, ſold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be ſmuggled by him into *England*: they had, however, no concern in the ſmuggling ſcheme itſelf, but merely ſold this tea to him, as they would have done to any other perſon in the common and ordinary courſe of their trade.

Mr. *Mansfield*, in ſupport of the rule, inſiſted, that the contract for the ſale of this tea being founded upon an intention to make an illicit uſe of it, which intention and purpoſe was with the privity and knowledge of the plaintiff, he was not entitled to the aſſiſtance of the laws of this country to recover the value of it. He cited *Huberus* 2 *vol.* 538, 539, and *Robinſon* v. *Bland**, to ſhew that the contract muſt be judged of by the laws of this country, and conſequently that an action for the price of the tea could not be ſupported here.

* 2 *Bur.* 1077, ſince alſo reported in 1 *Black. Rep.* 234-256.

Mr. *Dunning*, Mr. *Davenport*, and Mr. *Buller*, *contra*, for the plaintiff, contended, that the contract being complete by the delivery of the goods at *Dunkirk*, where the plaintiff might lawfully ſell, and the defendant lawfully buy, it could neither directly nor indirectly be ſaid to be done in violation of the laws of this country; conſequently it was a good and valid contract, and the plaintiff entitled to recover. It was of no moment or concern to the plaintiff what the defendant meant to do with the tea, nor had he any intereſt in the event. If he had, or if the contract had been that the plaintiff ſhould deliver the tea in *England*, it would have been a different queſtion; but there was no ſuch undertaking on his part. They preſſed the argument *ab inconvenienti*, and cited ſeveral caſes. MSS. *at Ni. Pri.* before Lord *Mansfield*, ſittings in *London*.—An action brought by the plaintiffs, who were lace-merchants in *Paris*, for laces (which were contraband in this country) ſold and delivered to the defendant's order at *Calais*. The queſtion made was, Whether the vendor of contraband goods at *Paris* was not bound to run the riſk of their being ſmuggled into this country? But Lord *Mansfield* held, that as the contract on the part of the plaintiff was complete by his delivering the laces at *Calais*, he was clearly entitled to recover, and the jury found a verdict accordingly.—*Faikney* v. *Reynous* and *Richardſon*, *Eaſt.* 7 *Geo.* 3. *B. R.* ſince reported in 4 *Bur.* 2,069. & 1 *Black.* 633. where one partner in a ſtock-jobbing contract lent the other 1,500*l.* to pay his moiety of the differences on the *reſcounter* day; and though this was pleaded

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to the bond, the court upon demurrer over-ruled the plea, and held the plaintiff was entitled to recover. *Bruſton* v. *Clifford.* in *Chan.* before Lord *Camden*, 4th *December*, 1767. *Alſibrook* v. *Hall* in *C. B.* where money paid for the defendant for a gaming debt was held recoverable by the plaintiff. 1775. HOLMAN *verſus* JOHNSON.

Lord MANSFIELD.—There can be no doubt, but that every action tried here muſt be tried by the law of *England*; but the law of *England* ſays, that in a variety of circumſtances, with regard to contracts legally made abroad, the laws of the country where the cauſe of action aroſe ſhall govern.—There are a great many caſes which every country ſays ſhall be determined by the laws of foreign countries where they ariſe. But I do not ſee how the principles on which that doctrine obtains are applicable to the preſent caſe. For no country ever takes notice of the *revenue* laws of another.

The objection, that a contract is immoral or illegal as between plaintiff and defendant, ſounds at all times very ill in the mouth of the defendant. It is not for his ſake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real juſtice, as between him and the plaintiff, by accident, if I may ſo ſay. The principle of public policy is this; *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cauſe of action upon an immoral or an illegal act. If, from the plaintiff's own ſtating or otherwiſe, the cauſe of action appears to ariſe *ex turpi cauſâ*, or the tranſgreſſion of a poſitive law of this country, there the court ſays he has no right to be aſſiſted. It is upon that ground the court goes; not for the ſake of the defendant, but becauſe they will not lend their aid to ſuch a plaintiff. So if the plaintiff and defendant were to change ſides, and the defendant was to bring his action againſt the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior eſt conditio defendentis.*

The queſtion therefore is, Whether, in this caſe, the plaintiff's demand is founded upon the ground of any *immoral* act or contract, or upon the ground of his being guilty of any thing which is prohibited by a poſitive law of this country.—An immoral contract it certainly is not; for the revenue laws themſelves, as well as the offences againſt them, are all *poſitivi juris.* What then is the contract of the plaintiff? It is this: being a reſident and inhabitant of *Dunkirk*, together with his partner, who was born there, he ſells a quantity of tea to the defendant, and delivers it at *Dun-*

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kirk to the defendant's order, to be paid for in ready money there, or by bills drawn perſonally upon him in *England*. This is an action brought merely for goods ſold and delivered at *Dunkirk*. Where then, or in what reſpect is the plaintiff guilty of any crime? Is there any law of *England* tranſgreſſed by a perſon making a complete ſale of a parcel of goods at *Dunkirk*, and giving credit for them? The contract is complete, and nothing is left to be done. The ſeller, indeed, knows what the buyer is going to do with the goods, but has no concern in the tranſaction itſelf. It is not a bargain to be paid in caſe the vendee ſhould ſucceed in landing the goods; but the intereſt of the vendor is totally at an end, and his contract *complete* by the *delivery* of the goods at *Dunkirk*.

To what a dangerous extent would this go if it were to be held a crime. If contraband clothes are bought in *France*, and brought home hither; or if glaſs bought abroad, which ought to pay a great duty, is run into *England*; ſhall the *French* taylor or the glaſs-manufacturer ſtand to the riſk or loſs attending their being run into *England*? Clearly not. Debt follows the perſon, and may be recovered in *England*, let the contract of debt be made where it will; and the law allows a fiction for the ſake of expediting the remedy. Therefore, I am clearly of opinion, that the vendors of theſe goods are not guilty of any offence, nor have they tranſgreſſed againſt the proviſions of any act of parliament.

I am very glad the old books have been looked into. The doctrine *Huberus* lays down, is founded in good ſenſe, and upon general principles of juſtice. I entirely agree with him. He puts the general caſe in queſtion, thus: *Tit. de conflictu legum, vol. 2. pag.* 539. "In certo loco merces quædam prohibitæ ſunt. "Si vendantur *ibi*, contractus eſt *nullus*. Verum, ſi merx eadem "*alibi* ſit vendita, ubi *non* erat *interdicta*, emptor condemnabitur, "quia, contractus inde *ab initio validus* fuit." Tranſlated, it might be rendered thus: In *England*, tea, which has not paid duty, is prohibited; and if ſold there the contract is *null* and void. But if ſold and *delivered* at a place where it is not prohibited, as at *Dunkirk*, and an action is brought for the price of it in *England*, the buyer ſhall be condemned to pay the price; becauſe the original contract was good and valid.—He goes on thus: "Verum ſi merces venditæ in *altero loco*, ubi prohibitæ "ſunt eſſent *tradendæ*, jam *non* fieret *condemnatio*, quia repugna-"ret hoc juri et commodo reipublicæ quæ merces prohibuit." Apply this in the ſame manner.—But if the goods ſold were to be *delivered* in *England*, where they are prohibited; the contract

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is void, and the buyer ſhall not be liable in an action for the price, becauſe it would be an inconvenience and prejudice to the ſtate if ſuch an action could be maintained. 1775. HOLMAN verſus JOHNSON.

The *giſt* of the whole turns upon this; that the concluſive delivery was at *Dunkirk*. If the defendant had beſpoke the tea at *Dunkirk* to be ſent to *England* at a certain price; and the plaintiff had undertaken to ſend it into *England*, or had had any concern in the running it into *England*, he would have been an offender againſt the laws of this country. But upon the facts of the caſe, from the firſt to the laſt, he clearly has offended againſt no law of *England*. Therefore, let the rule for a new trial be diſcharged.

The three other judges concurred.

THE END OF TRINITY TERM.

MICHAELMAS TERM

16 GEORGE III. B. R. 1775.

MASSEY *verſus* RICE *et al'*.

Friday, Nov. 10th.

What is a ſufficient deſcription in a common recovery.

THIS was a writ of error from a judgment on *ſcire facias* in the court of King's Bench in *Ireland*, brought to reverſe four common recoveries in the Court of Common Pleas there; *viz.* two of lands in the *county* of *Limerick*, and two of lands in the *city* of *Limerick*; but the Court of King's Bench in *Ireland* affirmed them all.

This caſe was argued twice; firſt, in the laſt term, by Mr. *Buller* for the plaintiff, and Mr. *Alleyne* for the defendant; and again in this term, by Mr. *Wallace* for the plaintiff, and Serjeant *Walker* for the defendant.

Mr. *Buller* for the plaintiff in error objected, that the ſeveral deſcriptions in all the four recoveries were bad. There were fourteen parcels in each recovery, and the principal objections he made were as follow: 1ſt, As to the premiſes in the *county*, becauſe ſome were demanded thus; "all thoſe the *caſtle*, *town*, and *lands* "of, *&c.* containing by *eſtimation* ſo many acres," without ſetting out the *quality* of the *lands*, as meadow, paſture, wood, and ſo forth; that a recovery would not lie of a *town*, and that ſo many acres by *eſtimation* were *uncertain*. Objection 2d, That others were deſcribed thus; "all that *part* of the *town* and *lands*, "&c. *now or late* in the *tenure* of ſuch and ſuch a perſon," which was *vague* and *uncertain*. Objection 3d, That two parcels were deſcribed as "containing a *plough-land*," which was alſo *vague* and *uncertain*.

In reſpect of the premiſes in the *city*, he objected, that they were all demanded by the deſcription of "*meſſuage or tenement*," which

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which was uncertain, and alſo as being ſaid to be "*now or late* "in the tenure, *&c.*" He inſiſted that a recovery has no effect till execution executed. 1 *Rep Shelley's* caſe. Sir *William Jones*, 10 *Str.* 1185. Therefore the deſcription of the premiſes ſhould be ſo certain, that the ſheriff may know how to execute it: And if bad in ejectment, a *fortiori* in a *præcipe*. *Bur.* 144. 1596. 1601.

To ſhew that the *nature* and *quality* of the *land* ought to be ſet out, he cited 1 *Inſt.* 4. – 11 *Co.* 25. *b.*

To ſhew that theſe deſcriptions would be bad in ejectment for want of ſetting out the *quality* of the land, he cited *Sayer's* caſe, 11 *Co.* 55. 1 *Rol. Rep.* 55. *pl.* 29. *S. C. Bridgeman* 56. 1 *Salk.* 254. *Cro. Jac.* 124. *Cro. Car.* 573.

To ſhew that both *quantity* and *quality* ſhould be ſet out, *Styles* 193. *Ley* 82. "four acres by *eſtimation* is *uncertain*." *Salk.* 254. 4 *Mod.* 98. *S. C.* 1 *Show.* 338. As to the uncertainty of the deſcription, "*meſſuage or tenement*," he cited 3 *Wilſ.* 23. where judgment was arreſted on this ſingle objection. *Moor* 691. *Popham* 22. If the deſcription in theſe recoveries are good, there would be no neceſſity for any deſcription at all. With reſpect to the 2d objection, he inſiſted, the deſcription was uncertain throughout. For *part of a town* might be any quantity: It might be a moiety, or more or leſs. So, the words "*now or late* "*in the tenure*," are equally vague: Conſequently, the ſheriff, by this deſcription, could have no means of finding out the premiſes. As to the word "*plough-land*," he ſaid it was applicable to every thing that affords food for a family, and ſo vague, that in 1 *Inſt.* 69. *a.* Lord *Coke* ſays, "a fine ſhall not be received *de una vir-* "*gata terræ* for the uncertainty." He alſo cited 1 *Leon.* 188. to ſhew that a *fine* of a *tenement* is uncertain: and ſubmitted upon theſe authorities, that the deſcriptions were all defective. 2*dly*, He contended, that if only *one* deſcription in each recovery was bad, the judgment muſt be reverſed *in toto*, becauſe *entire*; and therefore not to be divided: and cited *Cro. Car.* 471. *Str.* 807. *Cro. El.* 162. 1 *Leon.* 149. 1 *Rol. Abr.* 775. *pl.* 2. *Carthew* 235. 2 *Str.* 934.

Lord MANSFIELD.—There are fourteen different deſcriptions of lands in theſe common recoveries. Single out which is the ſtrongeſt.

Mr. *Buller* inſtanced the following: All that meſſuage or "tenement, with the appurtenances, ſituate in the lane between "the two Abbey Gates, with its appurtenances called, *&c.* now

1775. " or late in the poſſeſſion of *J. C.* his undertenants or aſſigns,
" in the county of the *city* of *Limerick*."

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Lord MANSFIELD.—I remember a caſe in ejectment, where there was a doubt how execution ſhould be executed; and the court directed an iſſue to guide the ſheriff in delivering execution. *Mountain* has been held a good deſcription of lands in *Ireland*; and it was mountain-land in a valley. *Vide* 1 *Str.* 71.

Mr. *Alleyne*, *contra*, ſaid he ſhould conſider, 1*ſt*, What degree of preciſion is required by the *Regiſter* to the deſcription of lands demanded in a *præcipe quod reddat*. 2*dly*, What indulgence was to be given to a common recovery as a conveyance and common aſſurance. 3*dly*, Whether from the *locality* of theſe particular lands the deſcriptions were not ſufficient. 1*ſt*, It is a general rule that the form of the regiſter muſt be followed, but there are caſes that admit of a deviation from it. The general principle upon which all forms are founded and upheld is, that the defendant may know what he has to defend; and therefore, whenever the term uſed either in reſpect of the quantity or the quality, is ſufficiently certain and notorious to anſwer that purpoſe, it will be good, though not particularly named in the regiſter. 1 *Rol. Rep.* 165. 2*dly*, Great favour is to be ſhewn to common recoveries, becauſe they are now a ſpecies of conveyance and common aſſurance of land. They are not like the caſes cited, moſt of which are caſes in *ejectment*, which are *adverſary* ſuits, and where the objections aroſe in conſequence of ſome eſſential defect, which is fatal. But a common recovery is in the nature of an amicable ſuit, which admits of a greater latitude, and any deſcription that would be good in a deed, would be good in a common recovery. 5 *Rep.* 40. *Popham* 22. *S. C.* 3*dly*, With regard to the *local* ſituation of theſe lands in *Ireland*, it has been always underſtood that the judges of *Ireland* know the deſcription of lands in that country better than the judges of this court; and therefore credit ought to be given to their knowledge. It was ſo expreſsly held in *Macduncoh* v. *Stafford*, 2 *Roll. Rep.* 166. 1 *Str.* 71. 1 *Bur.* 623—9; which laſt caſe in principle anſwers all the objections that have been made to-day. Another argument ariſes upon the ſtatutes of *Jeofails*, which is, that being after verdict, they are now too late. As to the objections made to the particular deſcription of theſe lands, 1*ſt*, The word "*town*" in *Ireland* does not mean as it does here, houſes inhabited, but is merely a technical deſcription of a particular diſtrict, and is notorious there.

2*dly*,

2*dly*, With reſpect to the uncertainty of "ſo many acres by "*eſtimation*," it is ſufficient if the general boundary be known; it is not neceſſary that the preciſe meaſure ſhould be accurately and exactly aſcertained; and as to the term land, in legal acceptation it always means arable. 3dly; Here the term meſſuage or tenement does not ſtand alone as in the caſe cited, but is accompanied with other words deſcriptive of its ſituation; ſuch as, "the lane between the two abbey gates, *&c.*" which render it ſufficiently certain for the ſheriff to deliver poſſeſſion: Beſides, it is the ſame deſcription as is uſed in the deed of ſettlement by which the eſtate was entailed. Therefore even if the deſcriptions were more doubtful, the court will make ſuch a conſtruction as will ſupport them. 1 *Mod.* 233.

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Upon a ſecond argument, Serjeant *Walker* for the defendant cited, 1 *Ventris* 52. 2 *Ventris* 31. 2 *Wilſ.* 116. Mr. *Wallace* for the plaintiff cited *Popham* 203. *Noy* 86.

Lord MANSFIELD.—The conſequences of theſe objections are ſo great; they are ſo void of the leaſt glimmering of reaſon and common ſenſe; and it would be attended with ſuch vaſt inconveniences to the public in many caſes, without a poſſibility of doing good in any, if in common recoveries which are a ſpecies of conveyance and common aſſurance, ſuch nice exceptions were to prevail; that the ſtricteſt proof of their being founded in law is neceſſary, to induce the court to overturn a recovery on ſuch grounds.

By the ſettled law of the land, men by deeds may fetter their eſtates: But tenant in tail when of age may unfetter them, obſerving a certain form. In this caſe there can be no doubt of the meaning of the tenant in tail, or of his power to unfetter this eſtate. The only queſtion is, Whether he has done it agreeable to the proper form? that is, Whether he has deſcribed the premiſes with ſufficient certainty? Now the deſcription which he has uſed, is the identical deſcription in the deed which created the fettering; and the objection which is made, is not ſo much that that deſcription is uncertain, as that ſix or ſeven hundred years ago, in an *adverſe* action, there was a doubt whether ſuch an objection would not have lain: and therefore the defendant would make the ſame objection and raiſe the ſame doubt now. But a common recovery is not an adverſe action.

It is ſaid that "all that meſſuage or tenement with the ap-"purtenances ſituate in the lane between the two abbey gates,

"now

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" now or late in the occupation of *J. C.* his undertenants or " aſſigns, in the county of the city of *Limerick*," is too vague and uncertain? But one muſt look with a microſcopic eye to diſcover that a *meſſuage or tenement*, &c. is ſo uncertain a deſcription, as that the ſheriff or any other perſon could not know how to find the premiſes by it: And the objection can only be made by a perſon who pores over the ſyllables of the words.

The objections are of two ſorts, and I have no doubt as to either. 1ſt, That the premiſes in the county are demanded thus: " All thoſe the *caſtles*, *towns*, and *land*, containing by *eſtimation*, " &c." which it is argued is uncertain both in reſpect of quality and quantity. As to that, it is admitted that " *caſtle*" is a good deſcription in *England*. " *Town*" was determined to be a good deſcription in *Cottingham* v. *King*. 1 *Bur.* 623. And " *land*" means *arable* land.

The next objection is, that the premiſes in the city are deſcribed thus; " All that *meſſuage or tenement*, with a garden or meadow " thereto belonging, ſituate, *&c.* and *now or late* in the occupa- " tion of, *&c. &c.*" which it has been contended would be a bad deſcription in *ejectment*. There are many caſes in ejectment which have gone very far indeed: And therefore the doctrine of thoſe caſes ought not to be extended. As to the authority in 3 *Wilſ.* 23. which would have great weight on account of its being ſo recent, the judges in that caſe decided againſt their own private opinion and inclination, becauſe they held themſelves bound by authority. But there, the words were only " *meſſuage or tenement*" without any other deſcription. Here there are other words " with the appurtenances and a garden, *&c.*" which ſhew that " meſſuage or tenement" are two words for the ſame thing: And that both mean a dwelling-houſe.

But this is not my fundamental ground of determination in the preſent caſe. What I ground my opinion upon is, the principles laid down in *Dormer*'s caſe, 5 *Co.* 40. *b.* reported alſo in *Popham* 23; and the diſtinction the court there take, between adverſe actions and common recoveries; which at that time were become a common aſſurance and conveyance of lands, *&c.* and which the court ſay, " being alſo made by aſſent between the parties, " ſhall, and always have had a different expoſition from what is " given to a recovery by *pretence* of title, or to the proceeding " in any other real action to which they are not to be compared:

" Therefore

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"Therefore a common recovery may be suffered of an advow-
"son, common in gross, warren, and the like, and the intent of
"the parties shall be observed." Now the objection in this case is an objection to the very same description as is used by the ancestor in the deed which created the entail. The sole object of the recovery is to unfetter the premises so entailed; and therefore I will not depart from this anciently established principle to do such cruel injustice, both against the intention of the parties, and against public convenience. Not one precedent has been cited where such an objection has been held good in the case of a common recovery. But a case of a fine has been cited where it was allowed, and from thence it has been argued by analogy, that it is bad in a common recovery; but the argument does not hold.

I agree with Mr. *Wallace* that the argument of the defendant not having made the objection in the first instance, is of no weight. But Serjeant *Walker* cited a case from 2 *Ventris* 31. which is very material; and is shortly thus: "In ejectment a
"special verdict found, that there was a *parish* of *Ribton* and a
"*vill* of *Ribton*, but the latter not co-extensive with the for-
"mer; and that the tenant in tail of lands *in* the *parish*, but
"*out* of the *vill*, bargained and sold the lands in the parish of
"*Ribton*, with covenant to levy a fine and suffer a recovery to
"the uses of the deed: But the fine and recovery were only of
"the *lands* in *Ribton*: The question was, Whether this recovery
"was good for the lands in the *parish* of *Ribton*." It was argued "that the common law knows no such division of the
"kingdom, as parishes, but only the division of vills; and there-
"fore, where a place is named in the record of the law, and no
"more said, it is always intended a vill: Consequently, that
"the recovery, if it passed any lands at all, could only pass those
"in the vill." But the court in favour of common recoveries held, "that this recovery should extend to the lands in the
"*parish* of *Ribton*; and the rather, because it being found by
"the verdict that the tenant in tail had *no lands* in *the vill*, the
"recovery must necessarily be void, unless it were extended to
"the lands in the parish." This decision is an instance of liberality that would not have been adopted or followed in an adverse *præcipe*. So in many other instances; as an *advowson*, for which no adverse action will lie, but a common recovery will. Therefore as the distinction between amicable and adverse suits exists; as the inconveniences of avoiding the recovery would

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would be great, as no precedent in point is produced, and there is no poſſibility of doubt about the intent of the parties, I am clearly of opinion that the judgment of *R. B.* in *Ireland* ought to be affirmed.

The three other judges concurred.

Per Cur. Judgment affirmed.

Tueſday, Nov. 14th.

LOVEACRES ex dim. MUDGE *verſus* BLIGHT, et Uxor.

One deviſes thus: "as "*touching* "*my worldly eſtate*, "I deviſe "the ſame "as follows; I "give to "my wife "*E. M.* 5*l.* "*to be paid* "*yearly* out "of my eſtate at "*G. Item*, "to *T. M.* "and *E.* "5*l.* each, "to be paid "twelve "months "after my "deceaſe. "*Item* to "my two "ſons *T.* "*M.* & "*R. M.* "whom I "make my "" "and ordain my "*ſole executors*, *all* "my *lands* "and *tenements freely to be enjoyed* and "poſſeſſed "alike." *T. M.* and *R. M.* are *tenants in common*, and take a *fee*.

IN Ejectment a ſpecial caſe was reſerved; the material facts of which were as follow: That *John Mudge* being ſeiſed in fee of the premiſes in queſtion by his laſt will, bearing date the 5th of *Auguſt* 1741, deviſed as follows: "*As touching ſuch* "*worldly eſtate*, wherewith it hath pleaſed God to bleſs me in "this life, I give, *demice* and diſpoſe of the ſame in the follow- "ing manner and form: Firſt of all I give and bequeath to "*Elizabeth Mudge* my dearly beloved wife, the ſum of five "pounds to be paid *yearly out of my eſtate* called *Gloze*, and alſo "one part of the dwelling-houſe being the weſt ſide, with as "much *Woodcroft home at her*, as ſhe ſhall have need of, by my "executors hereafter named. I give and bequeath unto my "ſon *Thomas Mudge* the ſum of five pounds, to be paid twelve "months after my deceaſe. I give unto my grand-daughter "*Elizabeth* the ſum of five pounds to be paid twelve months "after my deceaſe. *Item*, I give unto *John Mudge* and *Robert* "*Mudge*, my two ſons, whom I make my "and ordain my *ſole executors* of this my laſt will and teſtament, "*all* and ſingular *my lands* and meſſuages by them *freely to be* "*poſſeſſed* and enjoyed *alike*; and I do hereby utterly revoke and "diſannul all former wills and legacies and executors by me in "any ways before named, willed and bequeathed, ratifying and "confirming this and no other to be my laſt will and teſtament. "In witneſs whereof I have hereunto ſet my hand and ſeal the "day and year firſt above written, *John Mudge*.

"Before the ſealing of this will, I give to my wife *Eli-* "*zabeth Mudge*, all my houſehold goods to be deli- "vered by my executor, and after *my* death the ſaid "goods parted equally, be parted between the exe- "cutors alike."

That the teſtator died leaving three ſons; *Thomas*, *John*, and *Robert*: That *Thomas*, the eldeſt, died, leaving the leſſor of the plaintiff his eldeſt ſon; that *Robert* died ſoon after the teſtator, and *John* in *April* laſt, leaving iſſue. That the eſtate in queſtion was worth 20 *l. per annum*, and the perſonal eſtate of the teſtator worth 60 *l.* 1775. LOVE-ACRES *verſus* BLIGHT.

The queſtion was, Whether the plaintiff is entitled to recover the premiſes in queſtion?

Mr. *Wilſon* for the plaintiff, ſtated the queſtion to be, *what eſtate Robert* and *John Mudge* took in the premiſes; and inſiſted they took an eſtate for *life* only. 1ſt. Becauſe there are no *technical* words of *limitation*, nor words expreſſive of the teſtator's intereſt in the premiſes: Only "*lands* and *meſſuages*." 2dly, no *circumſtances* or expreſſions that ſhew an apparent *intention* in the teſtator to paſs a *fee*. The circumſtances from which it will be contended that ſuch intention does appear, are theſe: Firſt, the words "*freely to be poſſeſſed and enjoyed*;" but they may be fully ſatisfied by the deviſees enjoying the premiſes for life: And it is enough for the plaintiff, if they do not neceſſarily manifeſt an intention to give a fee; which they certainly do not. 2dly, that the eſtate is charged with an annuity of 5 *l.* to the teſtator's wife: But here the annuity is a *charge* upon the *land* (let who will be in poſſeſſion), not on the *perſons* of the deviſees; therefore not within the principle of the caſes which ſay, that the payment of a ſum of money ſhall give a fee. 3dly, The introductory words "*as touching my worldly eſtate*;" but theſe words *alone* do not import an intention to diſinherit the heir at law; and therefore are not of themſelves ſufficient to carry a fee. Where the word *eſtate* is uſed throughout a will, it may be held auxiliary; but here, in the clauſe upon which the objection ariſes, the teſtator has ſtudiouſly avoided uſing the word eſtate, and inſerted *meſſuages* and *lands* in its ſtead. 4thly, Some argument may be attempted from the legacy given to the heir at law; but no inference ariſes from that circumſtance, becauſe it is made payable out of the perſonal eſtate. Therefore, upon the whole of the will, there are no circumſtances which ſhew an apparent intention in the teſtator to give his younger ſons a fee; at leaſt the intent is ambiguous; and if ſo, the heir at law is entitled. But ſuppoſing they took a fee, the plaintiff is entitled to a moiety.

Lord MANSFIELD.—Reſerve that queſtion.

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LOVE-ACRES *verſus* BLIGHT.

Mr. *Kerby contra.* Upon the firſt queſtion, the only matter for the conſideration of the court is, Whether upon the whole of the will taken together, enough appears to ſhew the teſtator intended his younger ſons ſhould take a fee. That he did, is manifeſt; 1ſt, from the introductory words, "*as to all my worldly eſtate.*" And ſo it was held in *Forreſter* 157. *Ibbetſon* v. *Beckwith.* 1 *Wilſ.* 133. 3 *Wilſ.* 143. and in a late caſe *Hogan ex dim. Wallis and others* v. *Jackſon.** 2dly, From the *annuity* to his wife, which is a charge on the *perſon:* For the words "*by my executors*" refer to the *whole* ſentence; and therefore are equivalent to a deviſe to his executors "*they paying*" *&c.* which will give a fee. 3 *Bur.* 1534. 3dly, The legacy of 5 *l.* to his eldeſt ſon, ſhews he did not mean him to be the object of any further bounty. 4thly. The omiſſion after the words "whom I make my", may be aptly ſupplied by the word "*heirs*", which would put an end to the queſtion. 5thly, The words "*freely to be enjoyed by them,*" ſhews the teſtator meant to give it as fully and freely as he had enjoyed it himſelf. 6thly, Before the ſealing his will he gives his wife the houſhold goods, and deviſes them over after his death to his two younger ſons.

Ante, 299.

It is clear from hence that he thought his wife would otherwiſe take the abſolute property in them: And therefore it is a fair inference to ſay, that not diſtinguiſhing between real and perſonal eſtate, he thought the *whole* intereſt in the *real* eſtate paſſed, as the perſonal eſtate would have done, if he had not added the ſubſequent limitation. From all theſe circumſtances, enough appears to ſhew the teſtator meant a fee, and therefore the plaintiff ought not to recover.—As to the ſecond queſtion, he inſiſted that the deviſees were *joint tenants*; and therefore that the ſhare of the deceaſed brother ſurvived to the defendant.

Mr. *Wilſon contra*, as to the ſecond queſtion contended, that the words "to be enjoyed *alike*" made them *tenants in common*; for the word "alike" is equivalent to "equally" which has been held to create a tenancy in common. And this was clearly the intention of the teſtator: For he was providing for his children; therefore it is not natural to ſuppoſe that he meant the ſurvivors ſhould take the whole, and ſo leave the family of the ſon who died firſt deſtitute.

Lord MANSFIELD.—The principles by which this caſe muſt be governed, are ſettled by analogy to eſtabliſhed rules reſpecting the

the limitation of eſtates by deed at common law. If a man by deed of conveyance at common law gives land to another *generally*, *without* words of *limitation*, the donee has only an eſtate for *life*. But I really believe, that almoſt every caſe determined by this rule, as applied to a deviſe of lands in a will, has defeated the real intention of the teſtator. For common people, and even others who have ſome knowledge of the law, do not diſtinguiſh between a bequeſt of perſonalty, and a deviſe of land or real eſtate. But, as they know when they give a man a horſe, they give it him for ever; ſo they think if they give a houſe or land, it will continue to be the ſole property of the perſon to whom they have left it. Notwithſtanding this, where there are no words of limitation, the court muſt determine in the caſe of a deviſe affecting real eſtate, that the deviſee has only an eſtate for life: Becauſe the principle is fully ſettled and eſtabliſhed, and no conjecture of a private imagination can ſhake a rule of law.

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LOVE-ACRES *verſus* BLIGHT.

But as this rule of law has the effect I have juſt mentioned, of defeating the intention of the teſtator in almoſt every caſe that occurs; the court has laid hold of the generality of other expreſſions in a will, where any ſuch can be found, to take the deviſe out of this rule. Therefore, if a man ſays, "I give "*all my eſtate*," that has been conſtrued to paſs *a fee*: or even if words of locality are added; as "*all my eſtate in A*;" it has been held, that the whole of the teſtator's *intereſt* in ſuch particular lands will paſs, though no words of limitation are added. 2 *P. Wms.* 524: Becauſe the law ſays, that the word "eſtate" comprehends not only the land or property which a man has, but alſo the *intereſt* he has in it. So in a late caſe from *Ireland**, the court had no difficulty in ſaying, that the words "*all my worldly ſubſtance*," in the introductory part of the will, meant every thing the teſtator had; and that the words "all his *real effects*," in the ſubſequent reſiduary deviſe, were equivalent to *worldly ſubſtance*, and carried every thing to the reſiduary deviſee. In general, wherever there are words and expreſſions, either general or particular, or clauſes in a will which the court can lay hold of, to enlarge the eſtate of a deviſee, they will do ſo to *effectuate* the *intention*. But if the *intention* of the teſtator is *doubtful*, the rule of law muſt take place: So, if the court cannot find words in the will ſufficient to carry a fee, though they ſhould themſelves be ſatisfied beyond the poſſibility of a doubt, as to what the intention of the party was, they muſt adhere to the rule of law.

* *Hogan ex dim. Wallis* verſus *Jackſon*, *ante*, 299.

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LOVE. ACTER. *verſus* BRIGHT.

Now, though the introduction of a will, declaring that a man means to make a diſpoſition of *all his worldly eſtate*, is a ſtrong circumſtance, connected with other words, to explain the teſtator's intention of enlarging a particular eſtate, or of paſſing a fee where he has uſed no words of limitation, it will not do *alone*. And all the caſes cited in the argument, to ſhew that the introductory words in this caſe would *alone* be ſufficient, fall ſhort of the mark; becauſe they contained other words clearly manifeſting the intention of the teſtator to paſs a fee.

The queſtion is always a queſtion of conſtruction, and depends upon obſervations naturally ariſing out of the will itſelf. And therefore, if in this caſe there are words in the will which denote an intention in the teſtator to give his ſons more than an eſtate for life, the court will give effect to that intention.—Now if a man deviſe lands to another, *paying thereout* 100 *l.** or any other groſs ſum, though he add no words of limitation, yet the deviſee ſhall have a fee: becauſe unleſs he were to take a fee, he cannot be ſure of paying the 100 *l.* So if an eſtate be given to *A. to be ſold for payment of debts* and legacies †, the purpoſe to be anſwered makes it a fee, without words of limitation. In ſhort, wherever any thing is directed to be done, which, ſtrictly ſpeaking, an eſtate for life only may not be ſufficient to anſwer, the court will imply a fee.

* *Wellock v. Hammond.* 2 *Lev.* 114.

† 1 *Chan. caſes* 196-7.

Let us examine then the obſervations that ariſe upon this will. The firſt material obſervation upon which it has been argued that the teſtator meant to give his younger ſons a fee in this caſe, is, a bequeſt to his wife of an annuity of 5 *l.* &c. which he gives thus: "I give to my wife the ſum of 5 *l.* to be paid yearly out of "my eſtate called *Gloze*, and alſo one part of the dwelling-houſe "with as much wood-croft home *at her*, as ſhe ſhall have need of, "by my executors hereafter named." It is clear, that in this deviſe, ſome word is miſplaced or left out; and where that is the caſe, if it be neceſſary to diſcover the intention of the teſtator, the court may ſupply it. Now the moſt obvious word to be ſupplied here, as it ſtrikes me, is the word "requeſt;" *at her requeſt*, would make the ſenſe complete. Then, as to the deviſe itſelf, the 5 *l.* is directed to be paid by the executors out of the eſtate, and the wood is to be provided at all events; it therefore muſt be ſuppoſed to be brought home from off the eſtate. But if the executors were to take only an eſtate *for life*, they would not be able to pay the annuity during her life out of the profits only, or to furniſh all the wood ſhe might want; becauſe the ſtock on

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the eſtate might fall ſhort. It is but reaſonable therefore to infer, that ſuch an intereſt was intended, as would enable them to comply with the teſtator's directions, fully and completely in every reſpect.

It is not an immaterial obſervation that has been made upon the deviſe over of the houſhold goods to the executors, to be equally divided between them as the teſtator expreſſes it, "after "*my* death," which ſhould clearly have been "after *her death*."

The next obſervation ariſes upon the words "whom I make "*my*, and ordain, *&c.*" The word *my*, without ſome addition, means nothing at all. It cannot mean *executors*, becauſe the teſtator has expreſsly inſerted that word afterwards. It ſeems, therefore, moſt natural and proper to inſert the word *heirs*. But I reſt upon the other grounds, rather than upon the conjecture how the blanks ſhould be filled up.

The laſt obſervation is drawn from the words "*freely to be* "*poſſeſſed and enjoyed by them alike*." Now the word "*freely*," ſtrikes me as a very material word: For the teſtator has charged the eſtate with the payment of the annuity to his wife, *&c.* ſo that he could not mean by the word "*freely*" to give it *free of incumbrances*. The free enjoyment, therefore, muſt mean, *free from all limitations*; that is, the abſolute property of the eſtate.

Upon theſe obſervations ariſing on the face of the will itſelf, coupled with the introductory clauſe, I am of opinion upon the firſt queſtion, that the teſtator's intention was to give his ſons *John* and *Robert* a fee. If ſo, it is equally clear upon the ſecond queſtion, that this is a *tenancy in common*. The word "*alike*" is the ſame as the word "*equally*," and in the deviſe of the houſhold goods, the teſtator has made uſe of the word *equally*. Therefore the leſſor of the plaintiff is entitled to a moiety.

The three other judges concurred.

Per Cur. Judgment for the plaintiff for one moiety.

GOODWIN *verſus* CROWLE, Executor.

Friday, Nov. 24th.

ERROR from *C. B.* in an action of debt, to recover a penalty for the non-performance of articles of agreement, between the plaintiff and the defendant's teſtator.

In debt for a penalty, for non performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before the *ſtat.* 8 & 9 *Wm.* 3. *c.* 11. but then it can ſtand only as a *ſecurity* for the *damages ſuſtained*.

The agreement was, that the defendant in the original action, now the plaintiff in error, ſhould ſink a pit for the teſtator, and

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begin to work within 14 *days* after the date of the agreement, and continue working and ſinking the ſame, day and night, the ſix working days in the week, till it ſhould be completed. The *breach* aſſigned was, that he did *not* begin to ſink the pit in the articles mentioned *within* 14 *days* from the date of the ſaid agreement, and *continue* ſinking the ſame, *&c. prout* the articles. The defendant pleaded, that he was *ready to begin within the* 14 *days*; but that it was agreed between him and the teſtator, that *before he began to ſink* the pit, he ſhould drive or *ſink* a ſlough or *drain*, &c. and averred that he did immediately begin to ſink the ſaid drain; but before the ſaid drain could be ſunk, 20 days had elapſed; by reaſon whereof he could not begin to work the pit within the 14 days. Upon demurrer to this plea, and argument thereon, the court of *C. B.* gave judgment for the plaintiff, which he accordingly entered up for the whole penalty 250*l.* and 23*l.* 10*s.* coſts.

Mr. *Buller* for the plaintiff in error, objected, upon the errors aſſigned, 1*ſt*, That it did not appear by the record that the plaintiff had ſuſtained any damages. 2*dly*, That no writ of inquiry had been awarded to aſcertain the damages. 3*dly*, That the judgment ought not to have been taken for the whole penalty—but only entered up as a ſecurity.

He argued, that ſince the ſtatute 8 & 9 *Wm.* 3. *c.* 11. *ſect.* 8. the plaintiff cannot take judgment for the whole penalty, any further than as a ſecurity for the performance of the covenants; therefore the damages ought to have been aſcertained by a writ of inquiry. At common law the party was at liberty to take out execution for the whole debt: This drove defendants into Chancery; where, if compenſation could be made, the court would not ſuffer the penalty to be taken. The occaſion of this ſtatute was to moderate the rigour of the law. And ſince the ſtatute, this court has the ſame juriſdiction as the Court of Chancery had before. In reaſon and conſcience, the plaintiff ought not to retain the whole penalty, but only to be indemnified *quoad* what he has ſuffered: and cited *Drage* v. *Brand*, 2 *Wilſ.* 377. as in point. Alſo a later caſe, *Lys* v. *Hutchins*, 18th *June* 1773, in *Cam. Scacc*; but there the court were not all of the ſame opinion, and it went off upon the inſolvency of one of the parties. Here the plaintiff has elected to proceed under the act of parliament; for the declaration contains a *double* breach. 1*ſt*, *Not beginning* within fourteen days. 2*d*, *Not continuing* to work, *&c.* which would not have been good at common

mon law. 1 *Roll.* 112. *Saunders* verſus *Crawley*. Conſequently the plaintiff is now bound to abide by the direction of the ſtatute, and cannot take advantage of the penalty.

Mr. *Wood* for the defendant. Two objections have been taken to the judgment. 1ſt, That there ought to have been a writ of inquiry before final judgment. 2dly, That the judgment ought to have been entered up only as a ſecurity. The caſe of *Drage* verſus *Brand*, depended upon the firſt branch of the ſtatute. The court of *C. B.* thought the plaintiff had made his election to proceed upon the ſtatute; and, therefore, that the defendant ought to have the ſame advantage. There, *ſeveral* breaches were aſſigned; and the cauſe had gone down to trial, ſo that the ſame jury might have aſſeſſed the damages. But here, the plaintiff has in fact aſſigned only *one* breach: the covenant is one ſingle ſentence, "that he "ſhall begin within fourteen days, and continue to work," *&c.*

But ſuppoſe it were neceſſary for the plaintiff to have ſet out the breaches, and have a writ of inquiry; yet the judgment is regular, and he may now do it. By the ſtatute, it muſt be the ſame judgment as before; that is, a judgment for the penalty, and it is to ſtand as a ſecurity. Therefore, the form of the judgment is right.

Lord MANSFIELD.—The true conſtruction and ſubſtantial juſtice of the act is, that the penalty ſhall not be levied in any caſe whatever; but the judgment in this caſe being upon demurrer, it muſt be as uſual, to recover the debt. The ſtatute directs that the judgment ſhall be entered as heretofore; but then it is only to ſtand as a ſecurity for the damages ſuſtained. The plaintiff is not to aſſign the breaches till after the judgment is given.

If the plaintiff ſhould take out execution for the whole penalty, then is the time to complain: but there is no objection to the judgment as it ſtands; and on that ground only the court give their opinion that the judgment muſt be affirmed.

Per Cur. Judgment affirmed.

Lord MANSFIELD added, that in caſes where the court of Chancery order a judgment to be given as ſecurity, it is entered up in the uſual form, but the party cannot take out execution upon it for the ſum in which it is given.

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Tueſday, Nov. 21ſt.

FREEMAN *verſus* The Duke of CHANDOS *et al. et e contra.*

A remote reverſion in fee held to paſs under *general words* in an act of parliament, by way of ſettlement in execution of articles, tho' the reverſion was not particularly in contemplation at that time; the general words being ſufficient to carry it: and the intention of the parties being to include *all* the eſtate of the ſettlor.

THIS was a caſe out of Chancery for the opinion of this court, the material facts of which were as follow:

Mr. *Francis Keck* being ſeiſed in fee of the reverſion of the eſtate in queſtion, by his will, bearing date the 29th of *June* 1728, deviſed the ſame to his ſon *John*, and the heirs of his body; with remainder to his only daughter *Mary*, and the heirs of her body; with remainder to his ſix grand nephews, *Ferdinando*, *Anthony*, *Thomas*, *William*, *John*, and *Robert* (of whom *John Tracy Atkins* was the ſurvivor,) ſucceſſively for life, but not in order of ſeniority, and to their firſt and other ſons ſucceſſively in tail male, with remainder to his own right heirs, and died on the 29th of *September* 1728.

John the ſon died on the 23d *July* 1773, without iſſue, and inteſtate as to this reverſion: whereupon all the other nephews being dead without iſſue, it deſcended in equal ſevenths on the ſeven ſurviving ſiſters of *Francis Keck* as coparceners; of whom *Winifred* the wife of *John Nichol* was one, and *Mary* the mother of Mr. *Freeman* the plaintiff was another.

In 1740 *Winifred Nichol* died, without having deviſed or diſpoſed of the reverſion of her undivided ſeventh part of the ſaid eſtate; and thereupon the ſame deſcended on her only ſon and heir *John Nichol*, father of Lady *Carnarvon* aftermentioned.

John Nichol the ſon, by will dated the 5th of *March* 1746, gave all his real and perſonal eſtate to truſtees in truſt for his daughter *Margaret Nichol* at 21, and her *heirs*; and if ſhe died before 21, leaving *iſſue of her body*, then in truſt to convey the ſame to the *heirs of her body*.

Overtures having been made for a marriage with Miſs *Nichol* to the Marquis of *Carnarvon*, propoſals were laid before the maſter, entitled propoſals for a ſettlement, *&c. viz.* "That in conſideration of the ſaid marriage and *fortune* in *money* and *lands* of Miſs *Nichol*, to be diſpoſed of as aftermentioned, *&c* it was thereby agreed, that as ſoon after the marriage as the ſaid *Margaret Nichol* ſhould attain the age of 21 years, the *freehold* and *copyhold* eſtates of her *grandfather* and *father*, ſhould be ſettled upon the truſts there mentioned."

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The Maſter reported the propoſals proper, in conſequence of which articles were to be approved of, and were accordingly approved of by the Maſter.

The articles recited the propoſals, they alſo recited all the real and perſonal eſtates which Miſs *Nichol* was entitled to; under her grandfather and father's will, and the particulars were ſet out in ſeveral ſchedules by the Maſter; and it was thereby agreed, that they ſhould be ſettled to the uſes there mentioned. Upon the Marchioneſs coming of age, an act of Parliament 22 *Geo.* 2. *c.* 24. was made, intitled, "An act for ſettling the real and "leaſehold eſtates of the moſt honourable *Margaret Brydges*, "commonly called Marchioneſs of *Carnarvon*, wife of the moſt "honourable *James Brydges*, Eſquire, commonly called Mar-"quis of *Carnarvon*, and late *Margaret Nichol* ſpinſter, an in-"fant, for the benefit of the ſaid Marquis and Marchioneſs and "their iſſue; and for applying part of the perſonal eſtate of the "ſaid Marchioneſs for the purpoſes therein mentioned."

The act reciting the propoſals, articles, *&c.* enacts, "That "*all* and ſingular the *freehold* and *copyhold eſtates* of the "ſaid *Margaret* now Marchioneſs of *Carnarvon* (except as is "therein excepted) in the third and fourth ſchedule to the "articles mentioned, and *all other* the manors, meſſuages, lands, "tenements and hereditaments, freehold and copyhold, of the "grandfather and father of the ſaid *Margaret*, ſituate in the "ſeveral pariſhes of St. *Andrew*, *Holborn*, &c. or *elſewhere* in "*London*; and in the ſeveral pariſhes of *Fryern*, *Barnes*, &c. or "*elſewhere* in the county of *Middleſex*; and in the pariſh of South "*Stoneham* or *elſewhere* in the county of *Southampton*, and ELSE-"WHERE, *&c.* ſhall be veſted and ſettled to the uſes therein "mentioned." The only variation between the articles and the act was, that certain debts of the Marquis were to be paid, and in conſideration of the Marchioneſs agreeing thereto, all her eſtates were to be ſettled upon her and her heirs, in caſe ſhe ſurvived the Marquis having no iſſue, or failing iſſue between them.

At the time of the marriage and alſo at the time of paſſing the act, *Robert Tracy*, *Anthony*, *Thomas*, and *John* were alive, and *Thomas* had then a ſon living named *Dodwell*.

Margaret Marchioneſs of *Carnarvon* died on the 14th day of *Auguſt* 1768, without iſſue, and without having made any diſpoſition of the ſaid eſtates of her late grandfather and father, and inteſtate.

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Mr. *John Tracy Atkins* died on the 23d of *July* 1773, without iſſue; and then the reverſion of the eſtates now in queſtion dropt in, and devolved on the co-heirs of the ſaid *Francis Keck*, or the perſons claiming under them: and the Duke of *Chandos* having claimed the ſhare late belonging to Lady *Carnarvon*, and the co-heirs oppoſing the claim, Mr. *Freeman* filed a bill in *Chancery* againſt the Duke and all the other claimants for a partition, and by his bill controverted the Duke's claim, and his Grace filed a croſs bill to eſtabliſh it.

The queſtion was, Whether the reverſion in fee of one undivided 7th part of the eſtate in queſtion, paſſed under the act of parliament to the defendant the Duke of *Chandos?*

Mr. *Buller* for the defendant argued, that the intention of the parties was, to ſettle *all* the eſtate both real and perſonal of Miſs *Nichol*, except what was particularly excepted: that the *propoſals* were *general*, without *any* exception; that both the articles and act of parliament, were intended to carry the propoſals into execution; and that the words "and *elſewhere*" in the enacting part of the ſtatute page 17*. were ſufficient to carry the reverſion of this undivided 7th part, though not expreſsly mentioned. And if ſo, the court would give effect to ſo material a word, rather than reject it; more eſpecially as this was the caſe of a *deed*; and cited 3 *P. Wms.* 56.

* *Vide* the words of the enacting clauſe before mentioned.

Mr. *Kenyon*, *contra*, for the plaintiff ſaid, he did not deny that the words were large enough to carry the reverſion in queſtion, if it appeared to be the clear intention of the parties that it ſhould paſs. But he denied there was any ſuch intention. And if ſo, the court would control the operation of the words "and "*elſewhere*" which were a looſe general expreſſion, rather than give it effect contrary to the intent of the parties. And ſo it was done in the caſe of *Strong* verſus *Teat*, 2 *Burr.* 912. Here, the propoſals moved from the Duke of *Chandos*, whoſe object it was to get as much of the property of Miſs *Nichol* as he could. That there was not a ſurmiſe of this reverſion even being known to the Maſter; that the articles extended to nothing more than was contained in the propoſals; and that the act of parliament did not include even ſo much. Conſequently, as nothing appeared in either of theſe inſtruments from which it could be collected that the parties had this reverſion in view at the time, the court would reſtrain the generality of the expreſſion to thoſe eſtates only, which were in the contemplation of the parties.

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Lord MANSFIELD.—The material point in this caſe is, what the meaning of the parties was, *before* the paſſing of the act: that is, whether any thing was then in contemplation, except what the Marchioneſs was in poſſeſſion of. I have ſeen ſettlements in which it has been provided, that if any eſtate ſhall deſcend to the wife during coverture, it ſhall be ſettled to ſuch and ſuch uſes in the ſettlement named. In this caſe, the reverſion was after four ſons and their iſſue; and one of them had then a ſon living; ſo that it could be of no great value. We will think of it. If we have any doubt, it may be argued again, but if clear we will make our certificate.

Afterwards, on the 28th of *November* in this term, the court certified in theſe words:

"Having heard counſel on both ſides, and conſidered this "caſe, we are of opinion, from the propoſals, report and articles, "that the *intention* of the parties was to ſettle *all* the real and "perſonal eſtate of Miſs *Nichol* which ſhe had from her father "or grandfather, except what was particularly excepted: "Though, probably, this remote reverſion might not then be "in contemplation; and, therefore, the words of the articles do "not expreſsly include it. We conſider the act of parliament, "as a ſettlement, to execute the articles, with the variations "mentioned in the preamble: and though this remote rever-"ſion might not then be particularly thought of, yet the *gene-"ral* words are *ſufficient* to include it; and the *intention* of the "parties was to include *all*. Therefore, we are of opinion, that "the *reverſion in fee*, of one undivided ſeventh part of the eſtate "in queſtion, *did paſs*, by the act of parliament in the plead-"ings mentioned, to the defendant the Duke of *Chandos*."

FREEMAN Eſq. *verſus* Duke of CHANDOS *et al. et e contra.*

Same day.

THIS was a branch of the laſt caſe and ſent from the Court of *Chancery* alſo for the opinion of this court; the material facts were as follow:

One deviſes *all his eſtates*, &c. in the counties of *Glouceſter* and *Worceſter* and *elſewhere in the kingdom of England* to truſtees *ſubject* to certain *charges* thereon, and *limitations* in his *marriage ſettlement* named; in *truſt* to ſtand ſeiſed of the ſaid eſtates in *G.* and *W.* or *elſewhere*, to certain uſes. His eſtates in *G.* and *W.* were the only eſtates charged or mentioned in his marriage ſettlement. But he was alſo entitled to a reverſion of certain eſtates in the counties of *Oxford* and *Wilts*. Held that this reverſion paſſed by the words "*elſewhere in the kingdom of England.*"

Robert Tracy, in whom the reverſion in fee of one undivided ſeventh part of the *Keck* eſtate, (*vide* the laſt caſe,) was veſted as claiming under one of the co-heirs of the ſaid *Francis Keck*, made his will dated 16th of *October* 1766, and thereby deviſed "all

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" and every his manors, meſſuages, lands, tenements, hereditaments, and premiſes with their and every of their rights, members and appurtenances, in the counties of *Glouceſter* and *Worceſter* and *elſewhere in the kingdom of England*, and all his eſtates, uſe, benefit and intereſt in reverſion, remainder or expectancy, to truſtees, ſubject to certain charges thereon, and to certain limitations and eſtates to all his brothers ſeverally, and their reſpective firſt and other ſons in and by his marriage ſettlement, bearing date the 5th of *Auguſt* 1735, expreſſed and declared; in truſt, in caſe he himſelf and his ſaid brothers ſhould all die without iſſue male of his or their body or bodies, or his ſaid brothers ſhould die before the age of 21, then, to ſtand ſeiſed of the ſaid eſtates in *Glouceſter*, *Worceſter* or *elſewhere* and the reverſion or reverſions of ſuch eſtates, and of all his eſtate, uſe, benefit, and intereſt in reverſion and expectancy therein to the uſes there mentioned."

By the marriage ſettlement of *Robert Tracy*, the eſtates in *Glouceſter* and *Worceſter* were limited to himſelf for life, remainder to his firſt and other ſons in tail male, remainder to his three brothers *John*, *Thomas*, and *Anthony*, and their ſaid firſt and other ſons, ſucceſſively in ſtrict ſettlement.

After the death of *Robert Tracy* without iſſue, on the 28th *September* 1767, *John Tracy* thinking the reverſion in queſtion did not paſs by the will of *Robert Tracy*, made a codicil to his own will dated *Auguſt* 1ſt 1768, and thereby deviſed the ſame to truſtees on the truſts there mentioned.

Lady *Hereford*, the firſt deviſee under *Robert Tracy*'s will, claimed this reverſion; as did likewiſe the deviſees under the codicil of *John Tracy*.

The queſtion was, whether the reverſion in fee of one undivided ſeventh part of the *Keck* eſtate veſted in *Robert Tracy* did paſs by the will of *Robert Tracy*?

Mr. *Kenyon* was about to argue for Lord *Hereford*, but Lord *Mansfield* called upon the other ſide to go on.

Mr. *Buller* for Mr. *Freeman* argued, that from the words of the will referring to the limitation of the eſtates in the counties of *Glouceſter* and *Worceſter* and the charges thereon, it was manifeſt the teſtator had no other eſtates than thoſe in contemplation, at the time of making his will; and therefore, the reverſion in queſtion, which was a reverſion of eſtates in *Oxfordſhire* and *Wiltſhire*, would not paſs by the words " *elſewhere in the* " *kingdom of England*" and cited *Strong* verſus *Teat*, 2 *Bur.* 912. as in point.

Lord

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Lord *Mansfield* ſtopped Mr. *Kenyon*, ſaying it was too clear for him to give himſelf any trouble about it. If the words of the will are not ſufficient to carry the premiſes in queſtion, the dragnet of conveyances will never end.—Afterwards, on the 20th of *November* in this term, the court certified in theſe words.

"Having heard counſel on both ſides, and conſidered this "caſe, we are of opinion that the reverſion in fee of one undi- "vided ſeventh part of the *Keck* eſtate, veſted in *Robert Tracy*, "did paſs by the will of *Robert Tracy*."

CHAMBERLIN *et al. verſus* SONGHURST.

Friday, Nov. 24th.

The additional toll to be paid by waggons overweight, muſt be according to the *progreſſive* proportions named in the *ſtat.* 14 *Geo.* 3. *c.* 82. *ſect.* 2.—Not a *groſs* charge at the *higheſt* additional toll incurred, upon the *groſs* overweight.

IN caſe, for money had and received to the plaintiff's uſe, the facts at the trial appeared to be as follows. The plaintiffs were owners of a waggon which paſſed loaded through a turnpike belonging to a turnpike road, called the *Kent* road.—The defendant was appointed by the truſtees of that road a collector of tolls, and to weigh carriages paſſing on the ſaid road under the ſtatutes 13 *Geo.* 3. *c.* 84. and 14 *Geo.* 3. *c.* 82. among other acts. The plaintiff's waggon weighed 18 hundred overweight. The defendant inſiſted upon being paid at the rate of 20 *s. per* hundred for the *whole* overweight, which by that mode of calculation amounted to 18 *l.* and was paid accordingly.—Upon the general iſſue pleaded, a verdict was found for the plaintiffs for 13 *l.* & 6 *d.* and coſts, ſubject to the opinion of the court on the following queſtion; "Whether the defendant ought to have received "at the rate of 20 *s. per* hundred for more than *three* hundred "weight of the *eighteen* hundred overweight."

In caſe he ought not to have received the whole ſum of 18 *l.* the *poſtea* was to be delivered to the plaintiffs. In caſe he ought to have received the whole ſum, a nonſuit was to be entered.

Mr. *Morgan* for the defendant argued, that by the conſtruction of the ſtatute 13 *Geo.* 3. *c.* 84. *ſect.* 1. and 14 *Geo.* 3. *c.* 82. *ſect.* 2. the defendant was entitled to take 20 *s.* additional toll for *every* hundred overweight, whenever ſuch overweight exceeded *fifteen* hundred weight, which it did in this caſe; and, therefore, that a nonſuit ought to be entered.

Mr. *Lucas*, *contra*, for the plaintiffs inſiſted, that ſo much of *ſtat.* 13 *Geo.* 3. *c.* 84. as empowers the truſtees to take an additional 20 *s. per* hundred for *every* hundred overweight, was repealed by *ſtat.* 14 *Geo.* 3. *c.* 82. *ſect.* 2. and that the ſum to be taken,

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taken, as an additional toll for the overweight in this caſe, ought to have been calculated according to the following proportions mentioned in this latter ſtatute; *viz.* 3 *d. per* hundred weight for the 1ſt and 2d hundred weight; 6 *d.* for every hundred weight above two, and not exceeding five; 2 *s.* 6 *d.* for every hundred above five and not exceeding ten; 5 *s.* for every hundred above ten, and not exceeding fifteen, and 20 *s.* for every hundred above fifteen, which would have amounted only to 4 *l.* 19 *s.* 6 *d.* in all, inſtead of 18 *l.* which was the ſum demanded of, and actually paid by the plaintiff. And of this opinion was the court.

Per Cur. Poſtea delivered to the plaintiff.

WILKINSON *qui tam*, *verſus* ALLOT.

Monday, Nov. 27th.

Where a *qui tam* informer in debt on the *ſtat.* 21 *Hen.* 8. *c.* 13. is nonſuited, the defendant is entitled to coſts.

IN debt upon the *ſtat.* 21 *Hen.* 8. *c.* 13. for non-reſidence, the defendant pleaded the general iſſue, and at the trial the plaintiff was nonſuited. Mr. *Davenport* for the plaintiff had obtained a rule to ſhew cauſe why the maſter ſhould not be reſtrained from taxing the defendant his coſts: and now in ſupport of the rule, inſiſted, that as the plaintiff, if he had recovered, would not have been entitled to coſts, it was neither legal, nor juſt, nor reciprocal, that in the event of his having failed, he ſhould pay coſts to the defendant. That by *ſtat.* 24. *H.* 8. *c.* 8. a defendant can have no coſts on a nonſuit or verdict, where the plaintiff ſues to the king's uſe, which was the caſe here; becauſe half the penalty belongs to the king: That the *ſtat.* 18 *El. c.* 5. *ſect.* 3. did not extend to this caſe, but only to caſes where the *whole* of the penalty belongs to the informer, or where he is the *party grieved*, and cited 1 *Anderſ.* 116. *pl.* 162. as expreſsly in point to this purpoſe.

Mr. *Partridge*, *contra*, mentioned the *ſtat.* 23 *Hen.* 8. *c.* 15. *ſect.* 1. and *ſtat.* 4 *Jac.* 1. *c.* 3. *ſect.* 2. but relied chiefly on the *ſtat.* 18 *El. c.* 5. *ſect.* 3. the object of which he inſiſted was, to prevent vexation in common informers; and, therefore, had expreſsly provided, "that where *any* informer on *any* penal ſtatute ſhall be "nonſuit, he ſhall pay to the party defendant his coſts and char-"ges, *&c.*" That nothing could be more vexatious than the preſent action, there being no leſs than ſixteen charges of non-reſidence, in all of which the plaintiff had failed; and alſo a charge of occupying a farm contrary to the ſtatute, in which he had likewiſe failed. That as to the diſtinction taken between a

common informer, who is entitled only to *half* the penalty, and one who is entitled to the *whole*, no such distinction is to be found in the books: But the distinction is between a *common informer* and the *party grieved*, the former being liable to costs, the latter not; and cited 1 *Barnes* 124. *Jeynes qui tam* v. *Stephenson* *, as in-point. That here the plaintiff was not the party grieved, and therefore was liable to costs.

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* *Vide* 2 *Lem.* 116. *Degbead's* case.

Mr. *Graham* on the same side cited *Salk.* 30. *Kirkham* v. *Wheeler.* "Prosecutors *qui tam*, are looked upon as common informers:" and a note at the end of that case, in which it is said, that "where a statute gives a penalty to a *stranger*, he is a *common informer*, and shall pay costs upon *stat.* 18 *El. c.* 5: otherwise where the statute gives it to the *party grieved*, for he is not liable to costs."

Lord *Mansfield.* It is a certain principle that the king himself neither pays nor receives costs in any case. But this is not a suit prosecuted by the king, though he would have been entitled to a moiety of the penalty if it had been recovered: But it is the suit of a common informer. The *stat.* 23 *Hen.* 8. *c.* 15. is out of the case. But the *stat.* 18 *El. c.* 5. is decisive. In these *qui tam* actions, there is liberty given to the informer, by the same clause of the statute as provides for costs, to compound for the offence with leave of the court, which shews they are common informers. It is an exceedingly plain case. I think the plaintiff ought to pay costs, and also the costs of this motion.

ASTON Justice.—There is a case of *Greetham versus* the Inhabitants of the hundred of *Theale*, reported in 3 *Burr.* 1723, the ground of which, after it was decided, some of the judges thought the court had quite mistaken and misapprehended. Mr. Justice *Wilmot* and I thought so upon talking it over afterwards, and were for setting the matter right, but the costs were taxed. The mistake upon which the court went was, that the plaintiff being the *party grieved*, would have been entitled to costs if he had recovered; and, therefore, having failed, ought to pay costs to the defendant. But in fact, the plaintiff would not have been entitled to costs on the *stat.* 9 *Geo.* 1. *c.* 22. *sect.* 7. upon which that action was brought; because it is a statute *subsequent* to the statute of *Gloucester*, which gives costs only where damages were before recoverable. Now before the *stat.* 9 *Geo.* 1. *c.* 22. no damages were recoverable for what is there made the subject of an action against the hundred; therefore the plaintiff could not have had costs if he had succeeded; and consequently the defendant

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defendant was not entitled to any under the *ſtat.* 4 *Jac.* 1. *c.* 3. I would not have that caſe therefore, conſidered as a precedent; becauſe the court afterwards found that they had certainly miſapprehended the ground upon which they determined it.

The diſtinction taken in the books is this; whereſoever a ſtatute ſubſequent to the ſtatute of *Glouceſter* increaſes damages to the double or treble value, where damages were *before given*, the plaintiff ſhall recover *coſts*, and thoſe coſts ſhall alſo be doubled or trebled, as the ſtatute may be. But where ſingle, double, or treble damages are *newly given* by ſuch ſubſequent ſtatute, where *no damages were formerly recoverable*, there the plaintiff ſhall recover thoſe damages only, and *no coſts*: becauſe the ſtatute of *Glouceſter* does not operate to add coſts to what is given by ſuch ſubſequent ſtatute. 2 *Inſt.* 289. *Gilb. Hiſt. C. P.* 258, 259. Therefore I am of opinion the rule ought to be diſcharged.

ASHHURST Juſtice. The object of this ſtatute was to prevent vexation in common informers; and therefore, in that reſpect, there is no diſtinction between a common informer *qui tam*, and one who is entitled to the whole penalty; for he may be juſt as vexatious when he proſecutes on behalf of the king and himſelf jointly, as when he ſues on his own ſeparate account.

Per Cur. Rule diſcharged.

THE END OF MICHAELMAS TERM.

HILARY TERM

16 GEORGE III. *B. R.* 1776.

FARREN *qui tam*, *verſus* WILLIAMS.

Tueſday, Jan. 23d.

Willes Juſtice abſent. The *Quarter Seſſions* may proceed by *information*, on the *ſtat.* 5 *Eliz. c.* 4§ for exerciſing a trade, not having ſerved an apprenticeſhip or ſeven years.

THIS was an information *qui tam* on the ſtatute 5 *El. c.* 4. *ſect.* 39. brought in the court of Quarter Seſſions, in the city of *London*, againſt the defendant, for exerciſing the trade of a tallow chandler, not having ſerved ſeven years apprenticeſhip. It was removed by *certiorari* into this court, and tried before Lord *Mansfield* at the ſittings after *Trinity* Term 1775, when the defendant was found guilty.

Mr. *Dunning* laſt term obtained a rule to ſhew cauſe, why the judgment ſhould not be arreſted for want of juriſdiction in the ſeſſions, upon the authority of the reſolution of *B. R.* upon the ſtat. 21 *Jac. c.* 4. *ſect.* 1. in Sir *Wm. Jones* 193.

Mr. *Wallace*, Mr. *Bearcroft* and Mr. *Buller* now ſhewed cauſe, and inſiſted, that by the ſtatute 5 *El. c.* 4. *ſect.* 39. and ſtat. 31 *El. c.* 5. *ſect.* 7. the quarter ſeſſions had a juriſdiction by information; otherwiſe they could have no juriſdiction at all, for they certainly could not proceed by way of indictment: and cited 1 *Bur.* 543. *Rex* v. *Wright.* 1 *Salk.* 373. *Hob.* 183. 327.—*Cro. Jac.* 75. 178. *Andr.* 216. *Rex* v. *Holmes.*

Mr. *Dunning* for the defendant ſaid, he admitted the courts of *Weſtminſter* could not take cognizance of offences againſt the ſtat. 5 *El. c.* 4. unleſs committed within the county where the courts ſit; and ſo the caſes cited certainly proved, but they proved no more. But what he ſhould contend for was, that the court of Quarter Seſſions had no authority to proceed by information in any caſe, unleſs it was expreſsly given them by ſtatute: And that the ſtatute in this caſe gave no ſuch authority. In ſupport of this general propoſition, he cited 6 *Co.* 19 *b. Gregory* verſus *Blaſhfield*, and *Cro. El.* 737. *Barnaby* v. *Goodale*: Where in error from a judgment in *Bury* upon an information on the ſtat. 5 *El. c.* 4. that point was expreſsly adjudged.

Lord *Mansfield* aſked, if it appeared that the information in that caſe was before the Quarter-Seſſions.

Mr. *Dunning*. It does not expreſsly appear in words, but it could be at no other court: if it had been at the ſeſſions of oyer and terminer, the objection would equally hold.—As to the objection that

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the Quarter Seſſions have no juriſdiction at all, unleſs they can proceed by information, they clearly may proceed by indictment. The modes of proceeding are by *ſtat.* 5 *Eliz. c.* 4. *ſect.* 39. given diſtinctly and ſeparately, *reddendo ſingula ſingulis:* Civil juriſdiction, by ſuit, *&c.* to Courts of civil judicature; criminal juriſdiction, to Courts of criminal judicature; and bill of complaint, to the preſident in council.

Lord MANSFIELD.—The whole queſtion turns upon the 39th ſection of the ſtatute. The words are very much embarraſſed, and the matter does not ſeem to be ſettled by any of the caſes. I wiſh to know the practice; and to inquire of ſome of the old clerks of aſſiſe how the uſage has been at *oyer and terminer.*

Mr. *Wallace* ſaid there had been ſome tried at *Lancaſter.*

ASTON Juſtice.—And elſewhere. I do not think the old caſe of *Gregory* v. *Blaſhfield* in 6 *Co.* 19. is concluſive: And if it has been a practice long received, we ſhould do wrong to overſet it. As to the caſe of *Barnaby* v. *Goodale, Cro. El.* 737. it does not appear that the court at *Bury* was a court of ſeſſions, or of *oyer and terminer. Cur. adviſare vult.*

The next day Lord *Mansfield* mentioned this caſe, and cited an opinion of *Holt* Chief Juſtice when at the bar, out of a note book belonging to the late Mr. *Gill* of *Durham.* The queſtion ſubmitted for *Holt*'s opinion was, "Whether an action could be "brought in the corporation court for exerciſing a trade con- "trary to the ſtat. 5 *El. c.* 4?" and the opinion was as follows; "I conceive an action cannot be brought in the corporation "court: But an information *qui tam* may be brought in the cor- "poration court of ſeſſions. *John Holt.*" His Lordſhip added, that he had mentioned it to ſeveral of the judges, who ſaid it had been cuſtomary on the circuits to try ſuch informations.

Mr. Juſtice *Aſton* ſaid, he had inquired of ſome perſons of great experience in ſeſſions buſineſs; and was informed by them, that it had been uſual to file ſuch informations.

Per Cur.—The rule for arreſting the judgment muſt be diſcharged.

Wedneſday, Jan. 24th. *Willes* Juſtice abſent. The office of *pariſh clerk* is a *temporal* office; and tho' appointed by the miniſter if removed by him without ſufficient cauſe, a *mandamus* will lie to reſtore him.

REX *verſus* ERASMUS WARREN Clerk.

MR. *Buller* laſt term ſhewed cauſe againſt a *mandamus* to reſtore *William Readſhaw* to the office of pariſh clerk of *Hampſtead:* He ſtated that the clerk was appointed by the miniſter. That he had ſince become bankrupt, and had not obtained his certificate; that he had been guilty of many omiſſions

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in the regiſter; was actually in priſon at the time of his removal, and had appointed a deputy who was totally unfit for the office: And therefore ſubmitted that there was ſufficient cauſe for removing him. 1776. REX *verſus* WARREN.

Mr. *Lucas*, *contra*, inſiſted that the office of pariſh clerk is a *temporal* office, *durante vitâ*: That the parſon cannot remove him: and that he has a right to appoint a deputy: And cited 1 *Bur.* 367. 2 *Str.* 942.—1108. 11 *Mod.* 261.

Lord MANSFIELD then ſaid, there was an application of this ſort in a caſe, *Rex* v. *Proctor*. *Mich.* 15 *Geo.* 3. where the parſon removed a pariſh clerk appointed by the former incumbent. There the right of amotion was in queſtion; and all agreed it muſt be ſomewhere, but that caſe was not decided.

ASTON Juſtice.—The court in that caſe recommended it to the miniſter to reſtore him upon his aſking pardon *.

Lord MANSFIELD.—What remedy is there in *Weſtminſter-hall* to remove him? He certainly has his office only *quamdiu bene ſe geſſerit*. But though the miniſter may have a power of removing him on a good and ſufficient cauſe, he can never be the ſole judge and remove him *ab libitum*; without being ſubject to the control of this court.

ASTON Juſtice.—As long as the clerk behaves himſelf well he has a good right and title to continue in his office: Therefore if the clergyman has any juſt cauſe for removing him, he ſhould ſtate it to the court.—Accordingly the court enlarged the rule to this term, that affidavits might be made on both ſides, of the cauſe and manner of amotion. *Adjornatur.*

And now on this day, upon reading the affidavits, Lord *Mansfield* ſaid, it was ſettled in the caſe of *Rex* v. Dr. *Aſhton*, 28 *Geo.* 2. 1754. "That a pariſh clerk is a *temporal* officer, and that the "miniſter muſt ſhew ground for turning him out." Now in this caſe, there is no ſufficient reaſon aſſigned in the affidavits that have been read, upon which the court can exerciſe their judgment; nor is there any inſtance produced of any miſbehaviour of conſequence: therefore the rule for a *mandamus* muſt be abſolute. *Per Cur.* Rule abſolute.

HAMBLY *et al'*, Aſſignees of MOON *verſus* TROTT Adminiſtrator.

Same day.

IN *Trover* againſt an adminiſtrator *cum teſtamento annexo*, the declaration laid the converſion by the *teſtator* in his lifetime. Trover does not lie againſt an executor for a converſion by his teſtator.

* I omitted inſerting the caſe of *Rex* verſus *Proctor* in it's place, becauſe it was compromiſed as above; and the Court gave no opinion.

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Plea, that the *teſtator* was *not guilty*. Verdict for the plaintiff.

Mr. *Kerby* had moved in arreſt of judgment upon the ground of this being a perſonal *tort*, which dies with the perſon; upon the authority of *Collins* v. *Fennerell* *, and had a rule to ſhew cauſe.

* *Trin.* 22 & 23 *Geo.* 2. *B. R.*

Mr. *Buller* laſt term ſhewed cauſe.—The objection made to the plaintiff's title to recover in this caſe is founded upon the old maxim of law which ſays, *actio perſonalis moritur cum perſonâ*. But that objection does not hold here; nor is the maxim applicable to all perſonal actions; if it were, neither *debt* nor *aſſumpſit* would lie againſt an executor or adminiſtrator. If it is not applicable to all perſonal actions, there muſt be ſome reſtriction; and the true diſtinction is this: Where the action is founded merely upon an injury done to the perſon, and no property is in queſtion; there, the action dies with the perſon: as in aſſault and battery, and the like. But where property is concerned, as in this caſe, the action remains notwithſtanding the death of the party.

Trover is not like treſpaſs, but lies in a variety of caſes where a party gets the poſſeſſion of goods lawfully. It is founded ſolely in *property*: And the value of the goods only can be recovered. Therefore, the damages are as certain as in any action of *aſſumpſit*. As to the caſe of *Collins* v. *Fennerell* it is a ſingle authority and was not argued; therefore, moſt probably was determined ſimply on the old maxim. But *Savile* 40, caſe 90. is directly the other way.

Where the damages are merely vindictive and uncertain, an action will not lie againſt an executor; but where the action is to recover property, there the damages are certain, and the rule does not hold. This is an action for ſheep, goats, pigs, oats, and cyder converted by injuſtice to the uſe of the perſon deceaſed: Therefore, this action does not die with the perſon.

Mr. *Kerby contra* for the defendant cited, *Palm.* 330. where *Jones* Juſtice ſaid, "that when the act of the teſtator includes "a *tort*, it does not extend to the executor; but being perſonal "dies with him; as *trover* and *converſion* does not lie againſt an "*executor* for trover *fait par luy*." *Collins* v. *Fennerell* above cited.

Here, the goods came to the hands of the teſtator, and he converted them to his own uſe. Trover is an action of *tort*; and converſion is the giſt of the action: No one is anſwerable for a *tort*, but he who commits it; conſequently this action can only be maintained againſt the perſon guilty of ſuch converſion. But here the converſion is laid to be by the teſta-

tor. Therefore the judgment must be arrested. The distinction that has been taken in the books is, that the action may be maintained *by* an executor but not *against* him. *Popham* 31. *Hughes* v. *Robotham* *Popham* 139. *Le Mason* v. *Dixon*. 1776. HAMBLY *versus* TROTT.

Lord MANSFIELD. If this case depends upon the rule, *actio personalis moritur cum personâ*, at present only a *dictum* has been cited in support of the argument. Trover is in form a *tort*, but in substance an action to try property.

Mr. *Kerby*. The executor is answerable for all contracts of the testator, but not for torts.

Lord MANSFIELD. The fundamental point to be considered in this case is, whether if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, *&c.* in question: In that case, an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

ASTON Justice. Suppose the executor had had a counter demand against the plaintiff, he could not have set it off in *Trover*: but in an action for money had and received, he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions of trover, and actions for money had and received. As at present advised, I incline to think trover maintainable in this case.

ASHHURST Justice. The maxim does not hold as an universal proposition; because *assumpsit* lies. As to the case of *Collins* v. *Fennerill*, all the court considered it as unargued, and given up rather prematurely by Mr. *Henley*.

Lord MANSFIELD. The criterion I go upon is this: Can justice possibly be done in any other form of action? Trover is merely a substitute of the old action of detinue. 2 *Keb.* 502. *Ventr.* 30. Sir *T. Raym.* 95.——The Court ordered it to stand over.

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Upon a second argument this day, Mr. *Dunning* cited *Cro. Car.* 540—1 *Sid.* 88.

Lord MANSFIELD. Many difficulties arise worth consideration. An action of trover is not now an action *ex maleficio*, though it is so in form; but it is founded in property. If the goods of one person come to another, the person who converts them is answerable. In *substance*, trover is an action of property. If a man receives the property of another, his fortune ought to answer it. Suppose he dies, are the assets to be in no respect liable? It will require a good deal of consideration before we decide that there is no remedy.

ASTON, Justice. The rule is, *quod oritur ex delicto, non ex contractu*, shall not charge an executor. 2 *Bac. Abr.* 444, 445. *tit. Executors and administrators.* 5 *Bac. Abr.* 280. *tit. Trover.* Where goods come to the hands of the executor in *specie*, *trover* will lie; where in *value*, an action for *money had and received.* But the difficulty with me is, that here it does not appear whether the goods came to the hands of the defendant in specie or in value.

Cur. advisare vult.

Afterwards, on *Monday*, *February* 12th, in this term, Lord *Mansfield* delivered the unanimous opinion of the court as follows:

This was an action of trover against an administrator, with the will annexed. The *trover* and *conversion* were both charged to have been committed by the testator in his life-time; The plea pleaded was, that the *testator* was *not guilty.* A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a *tort*, for which an executor or administrator is not liable to answer.

The maxim, *actio personalis moritur cum personâ*, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in *form* a *fiction*, and in *substance* founded on *property*, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant; if no other action could be brought against the executor, it seems unjust and inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

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We therefore thought the matter well deſerved conſideration: We have carefully looked into all the caſes upon the ſubject. To ſtate and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think theſe concluſions may be drawn from them.

Firſt, as to actions which ſurvive againſt an executor, or die with the perſon, on account of the *cauſe* of *action*. *Secondly*, as to actions which ſurvive againſt an executor, or die with the perſon, on account of the *form* of *action*.

As to the *firſt*: where the cauſe of action is money due, or a contract to be performed, gain or acquiſition of the teſtator, by the work and labour, or property of another, or a promiſe of the teſtator expreſs or implied; where theſe are the cauſes of action, the action ſurvives againſt the executor. But where the cauſe of action is a *tort*, or ariſes *ex delicto* (as is ſaid in Sir *T. Raym.* 57, *Hole* v. *Blandford*,) ſuppoſed to be *by force* and *againſt the King's peace*, there the action dies; as battery, falſe impriſonment, treſpaſs, words, nuiſance, obſtructing lights, diverting a water courſe, eſcape againſt the ſheriff, and many other caſes of the like kind.

Where the cauſe of action is money due, or a contract to be performed, gain or acquiſition by the labour or property of another, or a promiſe by the teſtator expreſſed or implied, the action ſurvives againſt the executor. Otherwiſe, if it be a *tort*, or ariſe *ex delicto*, ſuppoſed to be by *force*, and *againſt the peace*.

Secondly, as to thoſe which ſurvive or die, in reſpect of the *form of action*. In ſome actions the defendant could have waged his law; and therefore, no action in that form lies againſt an executor. But now, other actions are ſubſtituted in their room upon the very ſame cauſe, which do ſurvive and lie againſt the executor.—No action where in form the declaration muſt be *quare vi et armis, et contra pacem*, or where the plea muſt be, as in this caſe, that the *teſtator* was *not guilty*, can lie againſt the *executor*. Upon the face of the record, the cauſe of action ariſes *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in moſt, if not in all the caſes, where trover lies againſt the teſtator, another action might be brought againſt the executor, which would anſwer the purpoſe.—An action on the cuſtom of the realm againſt a common carrier, is for a *tort* and ſuppoſed crime: The plea is *not guilty*; therefore, it will not lie againſt an executor. But *aſſumpſit*, which is another action for the ſame cauſe, will lie.—So if a man take a horſe from another, and bring him back again; an action of treſpaſs will not lie againſt his executor, though it would againſt him; but an action for the uſe and hire of the horſe will lie againſt the executor.

There is a caſe in Sir *Thomas Raymond*, 71*, which ſets this matter in a clear light: There, in an action upon the caſe, the plaintiff

* *Bailey* v. *Burtles* et uxor.: executrix of *Richard Baily*.

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tiff declared, "that he was poſſeſſed of a *cow*, which he *delivered* to the teſtator, *Richard Bailey*, in his lifetime, to *keep* the ſame for the uſe of him the *plaintiff*; which cow the ſaid *Richard* afterwards *ſold*, and did *convert* and diſpoſe of *the money to his own uſe*; and that neither the ſaid *Richard*, in his life, nor the defendant after his death, ever paid the ſaid money." Upon this ſtate of the caſe, no one can doubt but the *executor* was liable for the *value*. But the ſpecial injury charged, obliged him to plead, that the *teſtator* was *not guilty*. The jury found him guilty. It was moved in arreſt of judgment, becauſe this is a *tort* for which the executor is not liable to anſwer, but *moritur cum perſonâ*. For the plaintiff it was inſiſted, that though an executor is not chargeable for a *mis-feaſance*, yet for a *non-feaſance* he is: as for non-payment of money levied upon a *fieri facias*, and cited *Cro. Car.* 539.—9 *Co.* 50.[b]. where this very difference was agreed; for non-feaſance ſhall never be *vi et armis*, nor *contra pacem*: But notwithſtanding this the court held "it was a *tort*, and that the executor ought not to "be chargeable." Sir *Thomas Raymond* adds, "*vide Saville* 40. "a difference taken." That was the caſe of Sir *Henry Sherrington*, who had cut down trees upon the Queen's land, and converted them to his own uſe in his life-time. Upon an information againſt his widow, after his deceaſe, *Manwood*, Juſtice, ſaid, "In "every caſe where any price or value is ſet upon the thing in "which the offence is committed, if the defendant dies, his exe-"cutor ſhall be chargeable; but where the action is for damages "only, in ſatisfaction of the injury done, there his executor ſhall "not be liable." Theſe are the words Sir *Thomas Raymond* refers to.

Here therefore is a fundamental diſtinction. If it is a ſort of injury by which the offender acquires no gain to himſelf at the expence of the ſufferer, as beating or impriſoning a man, *&c.* there, the perſon injured has only a reparation for the *delictum* in damages to be aſſeſſed by a jury. But where, beſides the crime, property is acquired which benefits the teſtator, there an action for the value of the property ſhall ſurvive againſt the executor. As for inſtance, the executor ſhall not be chargeable for the injury done by his teſtator in cutting down another man's trees, but for the benefit ariſing to his teſtator for the value or ſale of the trees he ſhall.

So far as the tort itſelf goes, an executor ſhall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but ſo far as the act

act of the offender is beneficial, his affets ought to be anſwerable; and his executor therefore ſhall be charged. 1776.

HAMBLY *verſus* TROTT.

There are expreſs authorities, that trover and converſion does not lie againſt the executor: I mean, where the converſion is by the teſtator. Sir *William Jones*, 173—4, *Palmer*, 330. There is no ſaying that it does.

The form of the plea is deciſive, *viz.* that the *teſtator* was *not guilty*; and the iſſue is to try the guilt of the teſtator. And no miſchief is done; for ſo far as the cauſe of action does not ariſe *ex delicto*, or *ex maleficio* of the teſtator, but is founded in a duty, which the teſtator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an *action for money had and received*. Therefore, we are all of opinion that the judgment muſt be arreſted.

Per Cur. Judgment arreſted.

REX *verſus* Doctor WINDHAM, Warden of Wadham College. *Thurſday, Jan. 25th.*

LORD MANSFIELD.—This is an application, by the majority of the Fellows of *Wadham* college to this court, for a *mandamus* to be directed to the warden of the college, to compel him to affix the common ſeal of the college to an anſwer of the ſub-warden, burſars, dean and principal officers of the college, to a bill filed in the Court of Chancery by *Thomas Lloyd* againſt the warden, fellows, and ſcholars. The object of the bill is to compel the execution of a leaſe according to an agreement alleged to have been made by the college, but which the fellows now inſiſt was not made by a majority of them, as it ought to have been. The warden diſapproves of the anſwer of the fellows, and therefore has refuſed to put the ſeal of the college to it.

Mandamus granted to compel the warden of *Wadham* college to affix the common ſeal of the college to an anſwer of the fellows, &c. in Chancery, contrary to his own ſeparate anſwer put in.

The ground on which the application has been made is, that there is no other remedy by which the end can be ſpecifically obtained.

In the Court of Chancery, when a bill is brought againſt a corporation, if the corporation is in contempt, there is no remedy by way of proceeding for a contempt *perſonally* againſt the real parties who offend; but the mode of compulſion is by ſequeſtration. In that caſe, the plaintiff is to proceed to take poſſeſſion of all the perſonal eſtate of the college; and if that will not make the members agree, he is to take poſſeſſion by ſequeſtrators of all the

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the rents and profits of their real eſtate. This mode of proceeding would affect the whole body, and puniſh the corporation at large. But the corporation at large is not in fault here; the majority of the body have obeyed the proceſs of the court of Chancery, as far as in their power lies, and are ready to put in their anſwer. But an individual, the warden, whoſe act is neceſſary to render that anſwer complete, lies by, and refuſes to put the ſeal of the college to it. I believe it is the firſt inſtance of the kind; and the Court of Chancery has ſtaid its proceſs for the contempt, in mercy to the acquieſcing parties, that the preſent application might be made.

Mr. *Kenyon* has ſaid very truly, that where there is no other legal ſpecific remedy to attain the ends of juſtice, the courſe muſt be by *mandamus*, which is a prerogative writ; and the very form of it, ſhews its object is to prevent a defect of juſtice. Thus it comes recommended by the Court of Chancery to have it ſpecifically done. But further, the parties out of caution have applied likewiſe to the viſitor. He acquieſces in the application to this court for a *mandamus*, and very rightly. For who could ever entertain a thought or idea of this being a diſpute proper for the viſitor to decide. It is not a private diſpute; but a ſuit by a third perſon againſt the whole body, for the ſpecific performance of an agreement. An application to the viſitor in ſuch a caſe is nugatory; for he cannot compel a ſpecific performance. But the court, if they have juriſdiction of the cauſe, will enforce it by their own means.

So where an eſtate is in the college, that is, in the whole body, and they are to act in a truſt; the viſitor cannot meddle in a matter which is the proper ſubject of ſuch truſt. *Green* v. *Rutherforth* before Lord *Hardwicke* aſſiſted by Sir *John Strange*, 1 *Ves.* 462.

Then, is it new in principle to apply for a *mandamus*, to have a corporation ſeal put to an inſtrument? Certainly not. The caſe of the *Lord High Steward* of the Univerſity of *Cambridge** is an authority upon the ſubject. Here, the application is for a *mandamus*; to compel the warden to put the ſeal to an anſwer. If the parties have a right, we ſhall ſtop all proceedings by refuſing it, for the Court of Chancery cannot proceed without the ſeal is put.

* 1 *Black. Rep.* 547.

Doctor *Windham* ſeems to have miſconceived the conſequence of his affixing the ſeal to the anſwer of the fellows, and to think it will make his corporate anſwer inconſiſtent with his private ſeparate anſwer; for he is of opinion the plaintiff's ſuit is juſt, and that

that the agreement ought to be executed. But his putting the college ſeal does not contradict his private ſeparate anſwer: And by refuſing to put it, he defeats the end he wiſhes to obtain. 1776.

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As to the ſtatute concerning the college ſeal being put, Dr. *Windham* contends for a negative; and that the warden muſt be one. The words of the ſtatute are theſe: "Hoc etiam volo, "ut ſolicitudine cautum ſit, ut nihil ſigilletur, quod non per "GARDIANUM et *majorem partem* ſociorum mature deliberatum "concordatur, et per EOSDEM comprobatur." I am clear theſe words do not give the warden a negative. Warden and fellows are a deſcription of the corporation; and the expreſſion "per "eoſdem," without any repetition of the word *gardianum* muſt mean the major part of the body. Therefore I am of opinion a *mandamus* ought to go.

The three other judges concurred.

Per Cur. Rule for a *mandamus* abſolute.

DRIVER *ex dim.* EDGAR *verſus* EDGAR.

Friday, Jan. 26th.

IN ejectment, upon not guilty pleaded, a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following caſe.

One deviſes to his daughter an *expreſs eſtate tail*; but afterwards ſays, ſuch deviſe ſhall be *void* as to *inheritance* of *heirs* if *ſhe die without iſſue*, and then the eſtate ſhall deſcend to his heir male. A common recovery ſuffered by tenant in tail in her life-time is good, though ſhe afterwards die without iſſue.

Devereux Edgar, being ſeiſed of the premiſes in queſtion, duly made his laſt will, and among other things deviſed as follows: "I give and bequeath unto my daughter *Temperance Edgar*, all that my farm or eſtate called the *Breed* farm, *&c.* to hold the ſame, from and after the death of my wife, to the ſaid *Temperance* my daughter, and to the *heirs of her body* lawfully begotten, and for *want of ſuch heirs*, to my right heirs for ever. *Item*, I give and bequeath unto my daughter *Mary Edgar*, all that my farm, *&c.* to have and to hold all the ſaid premiſes, to the ſaid *Mary* my daughter, and the heirs of her body lawfully to be begotten immediately after the deceaſe of my wife. Alſo I give to my ſaid daughter *Mary Edgar*, all that my farm, *&c.* to have and to hold the ſaid laſt mentioned farm and premiſes, from and immediately after my dear wife her mother's deceaſe, to the ſaid *Mary*, and to the heirs of her body lawfully to be begotten. And herein my mind and will is further declared, that in caſe either of my ſaid daughters, *Temperance* or *Mary*, ſhall happen to

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die or depart this life, ſingle, married, or widows, *not leaving children* or *child* living at their deceaſe legally begotten, that then her gift, legacy or bequeſt herein, or eſtate given her by this my will, ſhall be entirely *void*, as to *inheritance of heirs*, and of none effect: and the eſtate ſo given her, ſo dying without heirs of her body, ſhall deſcend and go to my heir male, and his heirs male; and he and they, ſo inheriting the ſaid bequeathed eſtate, ſhall pay or cauſe to be paid to the ſurviving ſiſter my daughter, the ſum of thirty pounds yearly, during her natural life, free of all taxes and deductions whatſoever.

The ſaid *Devereux Edgar* died ſo ſeiſed as aforeſaid, leaving the ſaid *Temperance* his wife, ſince deceaſed, *Robert Edgar* ſince deceaſed, father of the leſſor of the plaintiff, his eldeſt ſon, *Devereux Edgar*, his ſecond ſon, and two daughters, *Temperance Edgar*, one of the deviſees, who died unmarried, and *Mary Edgar* the other deviſee. In *Hilary* Term 1774, *Mary Edgar* ſuffered a common *recovery* of the premiſes in queſtion, the uſes of which recovery were to *herſelf* in *fee*; and afterwards made her will, by which ſhe deviſed part of the premiſes in queſtion to her niece *Mary Edgar* in fee, and the remaining part to her nephew *Devereux Edgar*, the defendant in fee; and ſoon after died *unmarried*, without having revoked the ſame.

The queſtion reſerved for the opinion of the court was, Whether the recovery ſuffered by *Mary Edgar*, was ſufficient to bar the ſeveral eſtates claimed by the leſſor of the plaintiff?

This caſe was argued twice; firſt, in laſt term by Mr. *Wilſon* for the plaintiff, and Mr. *Davenport* for the defendant; and now in this term by Mr. *Mansfield* for the plaintiff, and Mr. *Wallace* for the defendant.—On the firſt argument, Lord *Mansfield* ſaid, he had not any doubt himſelf at that time, but wiſhed to look into a caſe or two. The next day, Lord *Mansfield* directed this cauſe to ſtand over for further argument, and ſaid, the firſt point is, Whether *Mary*, the daughter, had not neceſſarily an eſtate tail to the hour of her death: if ſhe had not, the deviſe to the heirs of her body muſt be a contingent remainder to them, as purchaſors. If ſo, the next remainder to the heirs male of the teſtator muſt be void; for there cannot be a contingent remainder limited upon a contingent remainder. The next point is, Whether it is poſſible for heirs of the body to take as purchaſors at all. Upon looking into the caſes, I have found one which is very like the preſent, in 2 *Bac. Abr.* 59, 60. *Fountaine* v. *Gooch*. The only difference

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difference between that caſe and this is, that there, the eſtate is given over upon an indefinite failure of iſſue at her death.

In this caſe, if it was only an eſtate for life in the daughter, ſuch life eſtate muſt be forfeited by the common recovery.

For the plaintiff it was now inſiſted, that upon the whole of this will, the intention of the teſtator was not to give his daughter an *immediate eſtate tail*, which would have entitled her to ſuffer a recovery; but to give her an eſtate *for life only*, with a remainder in tail to her children, provided ſhe had any living at her death; and if none, then to give the eſtate over to the teſtator's own heir male, with remainder to his heirs male. For by the ſubſequent clauſe, "in caſe, *&c.*" it is plain that he conſidered the words "heirs of her body" and children, as ſynonimous terms: But even if he did not, in providing for the event which has happened of the deviſee dying without heirs of her body, he expreſsly revokes that eſtate of inheritance. This was manifeſtly the teſtator's intention, and therefore the court will give effect to it.

For the defendants, *contra*, it was argued, that by the words "heirs of her body," *Mary* the daughter clearly took an *eſtate tail* in the firſt inſtance; and that even ſuppoſing the teſtator to have uſed the words heirs of her body and children, as ſynonimous terms, yet the recovery was well ſuffered: For a deviſe to *A.* and her children, ſhe having none born at the time of the deviſe, is a good eſtate tail. 6 *Co.* 17. *b.* If ſo, the deviſe over cannot be an executory deviſe; for there can be no executory deviſe after an eſtate tail: Conſequently, if it can take place as a contingent remainder, it ſhall: and the rule of conſtruction has always been ſo; that is to ſay, wherever a contingency is limited to depend upon an eſtate of freehold which is capable to ſupport a remainder, it ſhall always be held a contingent remainder, and not an executory deviſe. 2 *Saund.* 388. *Purefoy* v. *Rogers.* 1 Lord *Raym.* 208. in the caſe of *Luddington* v. *Kime.* This is ſuch an eſtate of freehold in the daughter, as will ſupport a remainder; and therefore by the recovery that remainder is barred.—On the ſecond argument Mr. *Wallace* urged the caſe of *Fountaine* v. *Gooch*, 2 *Bac. Abr.* 59. 60. as expreſsly in point.

Lord *Mansfield* after ſtating the caſe ſaid, the validity of the recovery ſuffered by *Mary*, depends upon whether ſhe was tenant in tail of that eſtate, or tenant for life only: And it is neceſſary for the plaintiff to ſupport, that at the death of the teſtator, ſhe was (during her own life,) tenant for life only. Now the eſtate

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eſtate is given to her and the *heirs of her body*, which is an eſtate tail: Nevertheleſs, the intention of the teſtator may reſtrain that eſtate of inheritance, and confine it to an eſtate for life only. It is inſiſted that it was the intention of the teſtator, that the eſtate of inheritance ſhould be reſtrained: but, has the teſtator ſaid it ſhould be ſo during her life? No; he has only reſtrained it upon future contingencies. The firſt is, the event of her own death; but 'till that contingency happens the inheritance is in her. The ſecond is, upon her leaving no children.

If ſhe was only tenant for life under this deviſe, there is an end of the title upon the ſecond limitation: Becauſe, in that caſe, it is a limitation upon a contingent remainder which is void.

Further, ſuppoſing her tenant for life only, by ſuffering this common recovery, ſhe has committed a forfeiture. Who is to enter? The next heir male. Suppoſe ſhe had lived and had a ſon afterwards: the next heir male muſt take place, contrary to the clear intention of the teſtator in that caſe.

It is manifeſt that the intention of the teſtator was to prevent a common recovery being ſuffered. But where a teſtator intends that which by law he cannot do, the law will not allow his intention to take effect. If, therefore, ſhe was tenant in tail to the hour of her death, nothing is ſo clear, as that all conditions, limited upon ſuch eſtate tail, are avoided by the common recovery which has been ſuffered. And we are of opinion that *Mary* had an eſtate tail.

Per Cur. Judgment for the defendant.

Thurſday, Feb. 11th.

ATCHESON *verſus* EVERITT.

A Quaker's teſtimony on his *affirmation*, is admiſſible in an action of debt on ſtat. 2 *Geo.* 2. *c.* 24 againſt bribery.

THIS was an action of debt upon the ſtat. 2 *Geo.* 2. *c.* 24. *ſect.* 7. againſt bribery. Plea, Not guilty. Verdict for the plaintiff.

On behalf of the defendant, it was moved laſt term, that there might be a new trial; becauſe a *quaker* had been received as a witneſs on his *affirmation*; and it was objected, that this being a *criminal cauſe*, his evidence ought not to have been received.

It was argued laſt term by Mr. *Dunning*, Mr. *Popham*, Mr. *Rooke* and Mr. *Buller* for the plaintiff; and by Mr. *Mansfield* and Mr. *Morris* for the defendant.

Lord *Mansfield* then ſaid, This queſtion is very important, both as to all the Quakers in the kingdom, and to the general adminiſtration

ſtration of juſtice. I wiſh, when the ſtat. 7 & 8 *Wm.* 3. *c.* 34. was made, that the affirmation of a Quaker had been put on the ſame footing as an oath, in all caſes whatſoever: And I ſee no reaſon againſt it; for the puniſhment of the breach of it is the ſame. But even the indulgence they enjoy under this ſtatute, was obtained with much difficulty and ſtruggle. The legiſlature formerly looked upon non-conformiſts as criminal; and Quakers in particular, as obſtinate offenders. This only ſerved to increaſe their number: If they had been let alone, perhaps they would not have come down to theſe times. The more generous and liberal notions of the preſent times do not look upon real ſcruples in the light of an offence. The ſtatute 7 & 8 *Wm.* 3. *c.* 34. is, *primâ facie*, made in eaſe of Quakers. Indeed, even at that time, they were ſafe where the Attorney-General could controul; but they wanted to be ſecure from the perſecution of private individuals. In this act, however, there is an exception to their being admitted as witneſſes in *criminal cauſes*, and ſerving on juries. The queſtion therefore is, What the ſtatute means by the words "*criminal cauſes?*" Diligent ſearch has been made by Sir *James Burrow*, and more ſo by my brother *Aſton*, for precedents: and I believe they have furniſhed all the caſes that are to be found. The reſult of thoſe caſes is, that the courts of late years have, in favour of the Quakers, relaxed their former ſeverity. Their affirmation has been received in the caſe of an appointment of overſeers. 2 *Str.* 1,219. So in the caſe of an attachment againſt a Quaker himſelf.

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No caſe has been found in which it has been refuſed, where the action, though in *form* a *criminal* action, in *ſubſtance* is a mere action between *party* and *party*. I thought there was one upon the ſtatute of hue and cry, 27 *El. c.* 13. but the ground upon which it was refuſed in that caſe was, that the Quaker could not lay a foundation for the action without an *affidavit*. *Vide ſect.* 11.

In caſes, where an action and an indictment both lie for the ſame act; as in aſſault, impriſonment, fraud, *&c.* a Quaker is an admiſſible witneſs in the action, though not on the indictment.

There being no caſe in point, it is a material circumſtance, that actions for *penalties*, are to a variety of purpoſes conſidered as *civil ſuits*. They may be amended at common law. To be ſure, the action in this caſe is not only given to recover a penalty, but it is attended likewiſe with *diſabilities*. Therefore, it partakes much of the nature of a criminal cauſe. Moreover, the offence itſelf is not merely *malum prohibitum*, by ſtatute, but it

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was indictable at common law. Upon general principles, I think the affirmation of a Quaker ought to be admitted in all caſes, as well as the oath of a Jew, or a Gentoo, or of any other perſon who thinks himſelf really bound by the mode and form in which he atteſts. But how the law is in reſpect of this particular caſe, I am at preſent not at all decided in my opinion.

ASTON, Juſtice.—This action certainly partakes of a *criminal nature*. The crime itſelf was puniſhable at common law; and that puniſhment is now increaſed by additional penalties and diſabilities. I think an affirmation ought really to be put upon the ſame footing as an oath. But at preſent there is no authority to decide that this is a caſe in which it can be ſo, by law. Therefore I am for time to adviſe.—The court, next day, ordered this cauſe and another, *viz. Atcheſon* v. *Gough*, which depended preciſely upon the ſame queſtion, to ſtand over 'till this term.

Mr. *Morris* now argued for the defendant. It will be contended that a *Quaker's affirmation* ought in *all* caſes to be received, where the *oath* of another man is received. We are not now in the caſe of a man who, in conformity to the ceremonies of his own religion, refuſes to take the *general oath* preſcribed by *law*: But this is the caſe of a perſon who refuſes to take *any oath* at all.

Till the ſtatute 7 & 8 *Wm.* 3. there was no doubt about not receiving a Quaker's affirmation. But that ſtatute, in compliance with the prejudices of this ſect, broke in upon the rule of the common law, partly in favour to them, and partly for the general benefit of the ſubject. At the ſame time the legiſlature drew the line, by providing "that nothing ſhould enable the affirmation of a Quaker to be received in any *criminal cauſe*:" and another ſtat. 22 *Geo.* 2. *c.* 30. *ſect.* 3. ſays, "in any *criminal caſe*." But the court has already decided that *cauſe* and *caſe* are the ſame. The queſtion therefore is, Whether the preſent is a *criminal caſe* or not? Crimes and puniſhments are neceſſary attendants on each other. Puniſhment is a legal term, and is underſtood to be in conſequence of ſome offence. The charge againſt the defendant is a charge of bribery. The ſtatutes upon which the action is brought, treats bribery as an *offence*, throughout, and the perſon committing it is an *offender*. Conſequently it conſiders bribery as a crime. It will be ſaid, on the contrary, that this action to recover the penalty preſcribed by the ſtatute, is merely a civil action. That is not ſo. For bribery was a crime at common law: and the penalty given by the ſtatute is only part of the fine due at common law to the public

lic in ſatisfaction of the offence: beſides which, the ſtatute in- 1776.
flicts additional pains and penalties which are alſo incurred by the judgment.

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Secondly. To conſider this caſe upon the ſtatutes of *jeofails*. Though the proceedings in a civil action are amendable at common law, yet this caſe, more than any other penal action, is not within the ſtatute of jeofails: And cited *Moore* verſus *Huſſey*. *Hob.* 101. where in an action on ſtat. *Weſtminſter* 2. *c.* 35. the Court of *King's Bench* held "that the puniſhment of two years "imprisonment made it a penal action;" and therefore reverſed the judgment given in the *Common Pleas* in that caſe for the plaintiff, "becauſe there were no *plegii de proſequendo* entered."

Thirdly: Upon authorities. A Quaker's teſtimony is not admiſſible upon a rule for an information. 2 *Strange* 872. Nor upon rules to anſwer the matters of an affidavit. 2 *Str.* 946.

With reſpect to indictments and all proſecutions, which upon the face of them are manifeſtly criminal ſuits, there can be no diſpute. The queſtion therefore is, Whether it is the *form* alone, or the *ſubſtance*, that conſtitutes a *criminal action?* There are two caſes to this purpoſe: 2 *Str.* 1,219. where a rule for quaſhing an appointment of overſeers was held to be a civil action, and a Quaker's affirmation of ſervice of the rule admitted accordingly. But in 2 *Str.* 856. which was the caſe of an appeal of murder, though the appellant had a right to releaſe the appellee in every ſtage of the cauſe, a Quaker's evidence was rejected, becauſe in ſubſtance it was a criminal proſecution. And it matters not whether the offence is of the greateſt or leaſt magnitude: If the *end* of the action is *merely damages*, a Quaker's affirmation is admiſſible: But wherever the end is puniſhment, as in this caſe, it is not. As to the caſe of *Rex* verſus *Bell*, *Andrews* 200. and *Rex* verſus *Chamberlayne* there cited, they neither of them came up to this caſe. Here the penalty is not given as damages, but as part of the puniſhment: But if it were, ſtill this is a criminal action in reſpect of the additional pains and diſabilities incurred by the judgment. And this is an anſwer to the objection, that if the party were arreſted and impriſoned for the penalty, ſo much does the action partake of a civil ſuit, that the defendant might be diſcharged under an act of inſolvency: But ſuppoſing he could be ſo diſcharged, the inſolvent act could not remove the further pains and diſabilities.

Therefore, both upon the reaſon of the thing, and the authorities in the books, this is a *criminal* action, and conſequently a Quaker's affirmation is not admiſſible.

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Mr. *Rooke contra* for the plaintiff. The inclination of the court will be to receive this teſtimony: The Quakers' objection to taking an oath is founded on real ſcruples of conſcience; why ſhould not their religious prejudices be indulged as well as thoſe of a *Jew* or a *Mahometan*; yet the teſtimony of theſe laſt is received even in criminal caſes. I do not contend, that a Quaker's teſtimony can be received in this country in criminal caſes; but I contend that *this* is not a criminal caſe; and that in all caſes which are not ſtrictly criminal, our magiſtrates will be inclined to receive it. The queſtion muſt be decided by the words of the ſtatute 7 & 8 *W.* 3. *c.* 34. The preamble is, "to relieve Quakers "from proſecutions of contempt for not taking oaths when law-"fully required." The ſtatute allows them to make affirmation inſtead of taking an oath; but it provides, that their affirmation ſhall not be received in *criminal cauſes*. The general object of the ſtatute ſeems to have been, to take theſe ſectaries out of the hands of private ſubjects, and to leave them wholly to the diſcretion of the crown. In civil ſuits, the ſubject may ſue out an attachment of contempt, or may bring an action againſt any one who refuſes to obey a *ſubpœna*; but where the King's name is uſed, the Attorney-General can ſtop the proſecution. In this caſe, therefore, I am rather of counſel for the whole body of Quakers, than for the plaintiff in the preſent action; for, if their affirmation is not admiſſible, they are, in ſuch caſes as the preſent, open to all the perſecution they ſuffered before the ſtat. 7 & 8 *Wm.* 3. *c.* 34. was made for their relief.

The great queſtion is, Is this a criminal cauſe? The criterion of diſtinction between a criminal and a civil cauſe is, the *forum* of the proceeding, not the offence which occaſions it. An aſſault and nuiſance may be proſecuted either by action or by indictment; in the one caſe, a quaker's affirmation may be received; in the other, not. The offence of bribery may be proſecuted either by action or indictment. The plaintiff has choſen to proſecute by action, and in ſo doing he has proceeded civilly, not criminally. This cauſe is in its form an action of debt for a ſpecial cauſe, at the ſuit of a private ſubject. The plaintiff does not ſue *tam pro rege quam pro ſeipſo*: He ſues in his own name only, and recovers the whole penalty. The declaration ſtates, that the defendant owes the money; and that though often requeſted, he refuſes to pay. The ground of complaint is, the non-payment of a debt. The action is founded upon that implied contract, which every ſubject enters into with the ſtate to obſerve its laws. 3 *Black. Com.*

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Com. 158. The plea is, *nil debet*; not that the defendant is not guilty. The judgment is to recover the debt; and the party impriſoned for non-payment may have the benefit of the inſolvent act. Thus far, then, the whole is merely a civil proceeding. But it is ſaid, there is a diſability incurred by the judgment, and therefore it is a *criminal proceeding*. To this it may be anſwered, that the diſability is no part of the judgment, but only a conſequence of it: That the form of the proceeding is not affected by it; that the being reſtrained from ſuing for a debt beyond time of limitation, is as much a diſability, as the being reſtrained from voting; yet there is no doubt but that a Quaker may give evidence to prove a debt to be above ſix years' ſtanding. The legiſlature could not mean to exclude a Quaker's teſtimony in ſuch a caſe; for then the offence might frequently be committed with impunity. A Quaker may vote; muſt affirm againſt bribery: He may be ſolicited, bribed, and proſecuted for perjury. Ought not all theſe ſtatutes to be taken *in pari materia?* If by his affirmation he can claim to vote, and clear himſelf from the imputation of bribery, ought he not to be truſted as a credible witneſs to prove bribery in others?

As to authorities, there are none which ſay that this teſtimony ought not to be received, in a caſe like the preſent. The caſe of the *King* againſt *Bell*, *Andr.* 200, and the caſes there cited, are none of them in point againſt us; and they ſhew the ſtrong inclination of Lord *Hardwicke's* mind to receive the affidavits which were objected to. But the caſe of *Middleton* againſt Sir *Watkyn Williams Wynne*, is in point to ſhew that this is not a criminal cauſe. That was an action brought by Sir *Watkyn* againſt Mr. *Middleton* on the *ſtat.* 7 and 8 *Wm.* 3. *c.* 7. for double damages for a falſe return. Sir *W.* had a verdict and judgment. Mr. *Middleton* brought error; and one error aſſigned was, that the judgment concludes the defendant is *in miſericordia*, inſtead of awarding a *capiatur*. And that this being an action on a *penal ſtatute*, was not aided by the ſtatute of *jeofails*. Lord Chief Juſtice *Willes*, in delivering the opinion of the judges in the Exchequer chamber, ſays, "they are not agreed whether the judgment is right or "wrong, but they are all agreed, that if it is wrong, it is aided "by the ſtatutes of *jeofails*. It is true, the ſtatute 4 *G* 2. *c.* 26. "excepts criminal caſes from the ſtatutes of *jeofails*; but whether "this ſtatute 7 and 8 *W.* 3. be penal or remedial, as this is *not* a "*criminal proſecution*, the objection is aided." This is in point to ſhew the preſent is not a criminal proſecution; therefore, the evidence was properly received.

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Lord MANSFIELD.—When this caſe was argued before, I was deſirous, for many reaſons, that the queſtion ſhould be very fully conſidered, all the caſes looked into, and ſolemnly argued again. I think it of the utmoſt importance, that all the conſequences of the act of toleration ſhould be purſued with the greateſt liberality, in eaſe of the ſcrupulous conſciences of diſſenters on the one hand; but ſo as thoſe ſcruples of conſcience ſhould not be prejudicial to the reſt of the king's ſubjects. For a ſcruple of conſcience entitles a party to indulgence and protection, ſo far as not to ſuffer for it; but it is of conſequence that the ſubject ſhould not ſuffer too.

I have been furniſhed with a great number of caſes, which have paſſed in this court, upon motions for attachments and other collateral matters, where the affirmations of Quakers have been refuſed. But theſe ſeem all to have ariſen from the haſty deciſion of a caſe of *Hinton* v. *Byron**, 11 *Wm.* 3. (cited in *Rex* verſus *Bell*; where, on a motion for an attachment, the affidavit in ſupport of the application, was by a Quaker on his affirmation. Barely upon that, the attachment was objected to, and not a word was ſaid in ſupport of it: but for a good reaſon:—The moment the objection was made, the Quaker took the oath, or was ready to have taken it, and ſo the objection was not inſiſted on. And yet, it is remarkable, that the memory of theſe caſes has run through all the reſt, introduced very great confuſion, and not one of the authorities ſeems to have been argued or conſidered upon the act of parliament itſelf. But the preſent is not a caſe of that ſort. This is the caſe of evidence offered at a trial in open court.

This ſect ſprung up during the troubles, and was found at the reſtoration, with many other ſects of non-conformiſts equally ſcrupulous. At that time, the law conſidered their ſcruples of conſcience as a crime; and therefore, they were not allowed to be ſet up as an excuſe or juſtification of another offence. Therefore, when a Quaker, who was ſubpœnaed to give evidence, abſented himſelf, and an attachment iſſued in conſequence of it, he could not in excuſe ſay, that his conſcience prevented him from giving evidence; for that was a crime. So in the caſe of interrogatories. The conſequence was, he was obliged to anſwer, or be committed to priſon; and if his obſtinacy continued, he lay there for life.

The experience of eight-and-twenty years from the reſtoration to the time of the revolution, ſhewed that this obſtinacy was not

* The caſe of *Hinton* v. *Byron* is not mentioned in the printed report of *Rex* v. *Bell*, *Andrews*, 202.

merely

merely a pretence or colour given to right and wrong; but that it was a SCRUPLE, and that the ſect was ready to go through all kind of ſuffering in the pertinacious adherence to it. 1776.

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A more liberal way of thinking prevailed after the revolution *. The principles of toleration were explained and juſtified in conſequence of the writings of Mr. *Locke*, Lord *Somers*, and other great men of thoſe times: And a ſtatute paſſed, which, though not general, was very extenſive in the relief it afforded to ſcrupulous conſciences. That ſtatute was 1 *Wm.* & *Mar. c.* 18. commonly called the *Toleration Act*.

* 2 *Vezey*, 273. 276.

In the *tenth* ſection of that ſtatute, the legiſlature takes notice that there was a ſect called *Quakers*, who had religious principles, in which they differed from the eſtabliſhed doctrine of the church of *England*; and that one of their religious ſcruples was, the taking an oath according to the form preſcribed by the law of *England* to Chriſtians: and therefore, the act enables them to give aſſurance of their fidelity and allegiance to the ſtate, by what I may call *another form* of *oath*; becauſe it is appealing to the Deity for the veracity of what they ſhall ſay, and invoking his vengeance if they utter what is falſe.—This ſtatute was followed about ſix years after by another ſtatute 7 & 8 *Wm.* 3. *c.* 34. which allows a *Quaker* to *affirm* in caſes where *other perſons* are required to take an *oath*. But though the legiſlature had taken notice that they ought not to be puniſhed ſo far as barely their own opinion and ſcruples went; yet they did not extend the indulgence ſo as to let it operate in prejudice to the rights of other perſons. It is much, that even at that time they were not permitted to give evidence in this form in all caſes whatſoever. (I will ſtate the reaſons of it by and bye.) It has been truly ſaid, that ſince the caſe of *Omichund* verſus *Barker* *, and another caſe of great authority determined ſince, the nature of an appeal to heaven, which ought to be received as a full ſanction to evidence, has been more fully underſtood. I there argued, and the judges in delivering their opinions agreed, that upon the principles of the common law, there is no particular form eſſential to an oath to be taken by a witneſs: But as the purpoſe of it is to bind his conſcience, every man of every religion ſhould be bound by that form which he himſelf thinks will bind his own conſcience moſt. Therefore, though the Chriſtian oath was ſettled in very early times, yet *Jews*, before the 18th of *Edward* the Firſt, when they were expelled the kingdom, were permitted to give evidence at common law; and were ſworn, not on the Evangeliſts, but on the Old Teſtament

* In *Cane. Mich.* 1744. 1 *Atkins* 21.

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tament. No diſtinction was taken between their ſwearing in a civil or in a criminal caſe.

Since the caſe of *Omichund* verſus *Barker*, a queſtion was referred to all the judges of *England*, whether a *Turk* ſhould be permitted to ſwear on the *Alcoran* in a proſecution for a capital offence at the *Old Bailey*; and they were all unanimouſly of opinion that he might.

It is objected, that the Quakers are the only people in the world who ever refuſed to *ſwear*; but in *ſubſtance* their affirmation is the ſame thing; The *form* only is different; for an affirmation is a moſt ſolemn appeal and atteſtation to God of the truth.

There is a remarkable caſe reported in 2 *Sid.* 6. where Dr. *Owen*, Vice Chancellor of *Oxford*, in the year 1657, being called as a witneſs, refuſed to kiſs the book; but deſired it might be opened before him, and he lifted up his right hand. The jury prayed the opinion of the court, if they ought to give the ſame credit to him as to a witneſs ſworn in the uſual manner; and *Glynn* Chief Juſtice told them, that in his opinion he had taken as ſtrong an oath as any other witneſs: but, ſaid he, "if I were "to be ſworn, I would kiſs the book."

There is a ſect in *Scotland* who hold it to be idolatry at this day to kiſs the book: But their own form of ſwearing is much more ſolemn. At *Carliſle*, in the year 1745, upon a proſecution of ſome of the rebels, there was no evidence but of this ſect, who would not kiſs the book; and a caſe was ſent up for advice, whether they could be received as witneſſes. It was the opinion of thoſe who were conſulted here, that the evidence might be received; but it was not an object, and the proſecution went no further.

With regard to the exception againſt the teſtimony of Quakers in *criminal proſecutions*, it was occaſioned by a ſtrong prejudice in the minds of the great men who paſſed the *ſtat.* 7 & 8 *Wm.* 3. *c.* 34. I have looked into the debates of thoſe days, and find that every ſtep and clauſe of the act was fought hard in the Houſe of Commons, and carried by ſmall majorities. I know not whether the exception came in by way of *amendment*, but I think it did. It was firſt a temporary act, for *ſeven* years only. By *ſtat.* 13 *Wm.* 3. *c.* 4. it was continued for *eleven* years; and in the year 1713 there was an application to the Houſe of Commons to make it *perpetual*, but it was rejected. An application was afterwards made to the Houſe of Lords, who paſſed the bill, and it went down to the Houſe of Commons; but they would not give it even a firſt reading

ing. The whole hiſtory of the act may be ſeen in a very incorrect work, which never received the author's finiſhing hand: I mean Dr. *Swift*'s four laſt years of Queen *Anne*; and it is obſervable that Dr. *Swift* commends the Houſe of Commons for the oppoſition they gave to the act. 1776. ATCHESON *dem. jun.* EVERITT.

On the acceſſion of the preſent family to the throne, it was made perpetual, by *ſtat.* 1 *Geo.* 1. *ſt.* 2. *c.* 6. But the exception ſtill remained in criminal caſes or criminal cauſes: and it is extraordinary, that though many alterations were made in it by *ſtat.* 8 *Geo.* 1. *c.* 6. yet no variation was made as to this particular; which in ſome inſtances bears hard upon the Quakers, and leaves them in a worſe condition than they were when their ſect firſt aroſe. For before the *ſtat.* 7 & 8 *Wm.* 3. *c.* 34. if a Quaker were indicted for a capital offence, he might call Quakers as witneſſes in his defence, and that without oath; for formerly the priſoner's witneſſes were not ſworn. But now by *ſtat.* 1 *Ann. ſt.* 2. *c.* 9. *ſect.* 3. all perſons examined in criminal caſes muſt be examined on oath, both for and againſt the crown; therefore, if a Quaker be indicted, he cannot have the benefit of Quaker teſtimony.

It is not poſſible to ſay why the exception was made; but it is made, and muſt be followed.

The effect, however, is, that it is an exception not to be extended by equity. In remedial caſes, the conſtruction of ſtatutes is extended to other caſes within the reaſon or the rule of them. But where it is a hard poſitive law, and the reaſon is not very plainly to be ſeen, it ought not to be extended by conſtruction.

We come then to this queſtion: Is the preſent a *criminal cauſe?* A Quaker appears, and offers himſelf as a witneſs; can he give evidence without being ſworn? If it is a *criminal caſe*, he muſt be ſworn, or he cannot give evidence.

Now there is no diſtinction better known, than the diſtinction between *civil* and *criminal law*; or between *criminal proſecutions* and *civil actions*.

Mr. Juſtice *Blackſtone*, and all modern and ancient writers upon the ſubject diſtinguiſh between them. *Penal* actions were never yet put under the head of criminal law, or crimes. The conſtruction of the ſtatute muſt be extended by equity to make this a *criminal* cauſe. It is as much a *civil* action, as an action for *money had and received*. The legiſlature, when they excepted to the evidence of Quakers in *criminal* cauſes, muſt be underſtood to mean cauſes *technically* criminal; and a different conſtruction would not only be injurious to Quakers, but prejudicial to the reſt of the King's ſubjects who may want their teſtimony. The *Penal* actions are *civil* ſuits.

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case mentioned by Mr. *Rooke* of Sir *Watkyn Williams Wynne* versus *Middleton* *, is a very full authority, and alone sufficient to warrant the distinction between civil and criminal proceedings. In that case the question was, Whether the *stat.* 7 & 8 *Wm.* 3. *c.* 7. was penal or remedial? The court held "it was not a penal statute. But "supposing it was to be considered as a penal statute, yet it was "also a *remedial law*; and therefore the objection taken was cured "by *stat.* 16 & 17 *Car.* 2 *c.* 8." Now the words of exception in that statute, and also in *stat.* 32 *Hen.* 8. *c.* 30. and in *stat.* 18 *Eliz. c.* 14. are "*penal actions* and *criminal proceedings*." But Lord Chief Justice *Willes*, in delivering the solemn judgment of the court, says, there is another act which would decide of itself, if considered in the light of a new law, or as an interpretation of what was meant by penal actions in the *stat.* 16 & 17 *Car.* 2. *c.* 8. This is the statute of *jeofails* 4 *Geo.* 2. *c.* 26. for turning all law proceedings into *English*, and it has this remarkable conclusion, "that every statute of *jeofails* shall extend to *all forms and pro-* "*ceedings in English* (except in *criminal cases*); and that this "clause shall be construed in the most beneficial manner." This is very decisive.

* *Vide* 1 *Wilf.* 125. 2 *Str.* 1227.

No authority whatever has been mentioned on the other side, nor any case cited where it has been held that a *penal* action is a *criminal* case; and perhaps the point was never before doubted. The single authority mentioned against receiving the evidence of the Quaker in this case is, an appeal of murder †. But that is only a different mode of prosecuting an offender to death. Instead of proceeding by indictment in the usual way, it allows the relation to carry on the prosecution for the purpose of attaining the same end, which the King's prosecution would have had if the offender had been convicted, namely, *execution*: and therefore, the writers on the law of *England* class an appeal of murder in the books under the head of criminal cases.

† 2 *Str.* 856.

With regard to cases that have been cited as happening here, it is astonishing that it ever should have been doubted after the act of toleration, and after the *stat.* 7 & 8 *Wm.* 3. *c.* 34. when an attachment was moved for against a Quaker, whether or no he should be at liberty to give an answer on his solemn affirmation, without being obliged to take an oath. But it is true that it was doubted three times in Lord *Hardwicke*'s time, and never resolved ‡; for the court avoided the question by discharging the rule upon some other matter. I consider it, that as to his own answers, he is a good witness; for after the act of toleration, it was settled in the case of Sir *Thomas Harrison*,

‡ Rex v. Bell, *Andrews* 200.

riſon, Chamberlain of the city of *London*, verſus *Evans*, purſuant to the opinion of all the judges except one, "that a *diſſenter* from "the Church of *England* is not guilty of a *crime*, *barely* by having that *religious opinion**." 1776.

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Quakers,

* The particulars of that caſe were as follow: *Harriſon* levied a plaint in the ſheriff's court of the city of *London* againſt *Evans* in a plea of debt for ſix hundred pounds, for not ſerving the office of ſheriff, having been duly nominated, elected into and publicly called upon to give his conſent to take upon him the ſaid office purſuant to the charter of King *John*, the acts of the Common Council, *&c.* The defendant pleaded *firſt*, the corporation act, 13 *Car.* 2. *ſt.* 2. *c.* 1. *ſect.* 12. by which it is enacted, "That no perſon ſhall be elected into any office, or place in "the act mentioned concerning the government of any corporation, who ſhall not "within one year before his election have received the ſacrament of the Lord's "Supper according to the rites of the church of *England*, and have taken the oaths "of allegiance and ſupremacy, and ſubſcribed the declaration in the ſaid act ſpe-"cified: And in default thereof, every ſuch placing, election and choice, is de-"clared to be void." The defendant further pleaded the toleration act, 1 *Wm.* and *Mar. c.* 18. and then pleaded in ſubſtance and to the effect following: That the office of ſheriffs of *London* is an office to which the proviſion of the ſtat. 13 *Car.* 2. *ſt.* 2. *c.* 1. extends; that he is, and was at the time of the pretended election of him to the ſaid office, a *Proteſtant diſſenter*, qualified agreeably to the terms of the ſtat. 1 *Wm.* and *Mary*, *c.* 18. and that he had *not*, within one year next before the ſaid *pretended election*, *taken the ſacrament of the Lord's Supper* according to the rites of the *Church* of *England*, nor had ever, or *could* he in *conſcience* take the ſame, and that he was not bound by law to take the ſame, of which the Liverymen of the city had *due notice* at and before the time of the election; and by reaſon of the premiſes, *&c.* the ſaid liverymen were *prohibited* from *electing* him to the ſaid office; and the ſaid defendant was *diſabled*, and utterly *incapable* of being *elected* to be one of the ſheriffs of the ſaid city of *London*, and thereby the ſaid *ſuppoſed election* was *void*. The plaintiff in his replication ſet forth the ſtat 5 *Geo.* 1. *c.* 6. *ſect.* 1. for *quieting and eſtabliſhing corporations*, by which it is enacted, "That all perſons actually in the "poſſeſſion of any office, and who are required by ſtat. 13 *Car.* 2. *ſt.* 2. *c.* 1. to "take the ſacrament of the Lord's Supper according to the rites of the church of "*England* within one year, *&c.* ſhall be confirmed in their reſpective offices, not-"withſtanding their omiſſion to take the ſacrament as aforeſaid, and ſhall be in-"demnified from all incapacities," *&c.*

To this replication the defendant demurred. The plaintiff joined in demurrer, and, on argument in the ſheriff's court, judgment was given on the demurrer for the plaintiff. The defendant brought a writ of error returnable in the court of huſtings of *Common Pleas* in the city of *London*, aſſigned the general errors, and the plaintiff rejoined there was no error: The court of huſtings affirmed the judgment. Upon which the defendant obtained a ſpecial commiſſion of errors directed to Sir *John Willes*, Chief Juſtice of the *C. B.* Sir *Thomas Parker*, Chief Baron, Sir *Michael Foſter*, Juſtice of *R. B.* The Honourable *Henry Bathurſt*, Juſtice, *C. B.*, and Sir *Eardly Wilmot*, Juſtice of *R. B.*, or any two of them, to inſpect the ſaid judgment and affirmance thereof at *Guildhall*. After three ſolemn arguments before the Judges, in the ſaid commiſſion named, on the 5th of *July* 1762, the ſaid ſeveral judgments of the ſheriff's court, and the court of huſtings, were reverſed by the

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ſo was a fraud upon the plaintiff, who would not have left the horſe with the defendant, much leſs have had it put up to ſale at all, if he had not underſtood the defendant meant to comply with his directions, and that it was legal for him ſo to do. That this was the practice at all auctions; conſequently, if an univerſal practice, could be no fraud on any body. But in fact, this was no more than a direction to ſet the horſe up at that price, and that there ſhould be no bidding under.

Mr. *Wallace* and Mr. *Dunning* for the defendant inſiſted, that it would have been a fraud upon the ſale if the auctioneer had bid or provided a bidder to puff this particular lot or any other lot in the ſale; and, therefore, the action could not be maintained.

Lord MANSFIELD.—The matter in queſtion is in itſelf of ſmall value; but in reſpect of the principles by which it muſt be governed, it is a queſtion of great importance. Since the trial I have mooted the point with many who are not lawyers, upon the morality and rectitude of the tranſaction. The queſtion is, Whether a bidding by the owner of goods at a ſale under theſe conditions, namely, "that the higheſt bidder ſhall be the purchaſor, "and if a diſpute ariſe, to be decided by a majority of the per-"ſons preſent," is a bidding within the meaning of ſuch conditions of ſale?

There is no expreſs undertaking on the part of the defendant, nor is it, as has been ingeniouſly ſaid, a direction that there ſhould be no bidding under 15 *l.* which might be fair: But the direction given to the defendant is, "not to let the horſe *go under* "15 *l.*;" which implies there might be a bidding under that ſum. The queſtion then is, Whether the owner can *privately* employ another perſon to bid for him?—The baſis of all dealings ought to be good faith; ſo, more eſpecially in theſe tranſactions, where the public are brought together upon a confidence that the articles ſet up to ſale will be diſpoſed of to the higheſt real bidder: that could never be the caſe, if the owner might ſecretly and privately inhance the price, by a perſon employed for that purpoſe; yet tricks and practices of this kind daily increaſe, and grow ſo frequent, that good men give into the ways of the bad and diſhoneſt in their own defence. But ſuch a practice was never openly avowed. An owner of goods ſet up to ſale at an auction never yet bid in the room for himſelf. If ſuch a practice were allowed, no one would bid. It is a fraud upon the ſale, and upon the public. The diſallowing it is no hardſhip

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hardſhip upon the owner. For if he is unwilling his goods ſhould go at an under price, he may order them to be ſet up at his own price, and not lower: Such a direction would be fair: Or he might do as was done by Lord *Aſhburnham*, who ſold a large eſtate by auction; he had it inſerted in the conditions of ſale, that he himſelf might bid once in the courſe of the ſale: and he bid at once 15,000 or 20,000 *l.* Such a condition is fair; becauſe the public are then appriſed, and know upon what terms they bid.—In *Holland* it is the practice to bid downwards.

The queſtion then is, is ſuch a bidding fair? If not, it is no argument to ſay it is a frequent cuſtom: Gaming, ſtock-jobbing and ſwindling, are frequent. But the law forbids them all. Suppoſe there was an agreement to abate ſo much; which is the caſe where goods are ſold by one perſon in the trade to another: they abate ſometimes 10 or 15 *per cent.* Such an agreement between the owner and a bidder, at a ſale by action, would be a groſs fraud. What is the nature of a ſale by action? It is, that the goods ſhall go to the higheſt real bidder. But there would be an end of that, if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and ſeller. He may fairly bid for a third perſon who employs him, but not for the owner.

In this caſe, there is another fraud put upon the public. For by the catalogue the goods are deſcribed to be "the goods of a "gentleman deceaſed, and ſold by order of the executor." Upon this repreſentation, many people would attend to bid, on a ſuppoſition that the goods were neceſſarily to be ſold at all events, whether valuable or not valuable; whereas they might have their ſuſpicions if they were the property of perſons living. Horſes, or any other ſpecies of property, belonging to perſons that are dead, are not ſo likely to be faulty as thoſe which are parted with by perſons in their life-time.

We all remember the ſale of a gentleman's wines*, where vaſt quantities had been ſent in belonging to other perſons: And all ſold at a very high price, under an idea they were his. The conſequence was, moſt of the buyers were taken in.

* Mr. Bradſhaw's.

Therefore, upon full conſideration, I am of opinion, that a bidding by the owner in the manner contended for, and agreeable to the directions given in this caſe, would have been a fraud upon the ſale: And conſequently, that this action againſt the defendant as auctioneer, cannot be maintained.

ASTON, Juſtice—I am of the ſame opinion. The directions in this caſe are neither agreeable to the catalogue or the conditions.

Mr.

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BEXWELL *verſus* CHRISTIE. *Per Cur.*—Rule for a new trial without coſts, altered to a nonſuit without coſts.

Vide ſtat. 17 *Geo.* 3. *c.* 50. *ſect.* 10. and ſtat. 19 *Geo.* 3. *c.* 56. *ſect.* 12.

Howard v. *Caſtle*, 6 *T. R.* 642.

Same day.

ALEXANDER *verſus* VAUGHAN.

One who has traded to England, whether native, denizen, or alien, tho' never a reſident trader in England, but who comes over here occaſionally, and commits an act of bankruptcy, is an object of the bankrupt laws.

THIS was an action of treſpaſs againſt the meſſenger to a commiſſion of bankruptcy for ſeizing the books, papers, and bills of exchange of the plaintiff.

The defendant pleaded, 1*ſt*, The general iſſue; 2*dly*, A juſtification under the ſtatute 13 *Eliz.* *c.* 3.; 3*dly*, A juſtification under a commiſſion of bankruptcy iſſued againſt the plaintiff, ſetting forth the proceedings at large.—To the *laſt* plea, the plaintiff *replied*, that he was not a *merchant* and *trader*, and a perſon within the deſcription of the bankrupt laws.

At the trial before Lord *Mansfield* at the ſittings after *Michaelmas* term, 1775; at *Weſtminſter*, a general verdict was found for the plaintiff.

Upon a motion by Mr. *Wallace* for a new trial, Lord *Mansfield* reported the caſe ſhortly thus:

Alexander, the plaintiff, who was a native of *Scotland*, reſided there, and had a great houſe of trade at *Edinburgh*: beſides that buſineſs, he was concerned as partner with *Bell* and Company in a great brewery. In both characters he might be conſidered as one of the greateſt traders in *Europe*, and he traded to all parts of the world. He comes to *England*, and being there *occaſionally*, is arreſted, and lies in priſon *two* months, which is an act of bankruptcy.

The queſtion is, Whether by the *Engliſh* ſtatutes againſt bankrupts, a perſon, to come within the meaning and deſcription of a trader there named, muſt not be a *reſident* trader; that is, Whether, as the act of bankruptcy muſt be *local*, in *England*, the trading ſhould not be ſo likewiſe? or, Whether ſuch a perſon as the plaintiff, coming *occaſionally* to *England*, is liable to the *Engliſh* laws againſt bankrupts?

This is the general queſtion.—But the defendant inſiſts, that be the general queſtion as it may, the plaintiff in fact traded *in England* after his coming here, and ſeveral inſtances were given in evidence

evidence at the trial, and left to the jury. But they are not neceſſary to be moved till the court has decided the firſt point; therefore let the rule be, to ſhew cauſe why a nonſuit ſhould not be entered, with liberty to move for a new trial, if the court ſhould be of opinion with the plaintiff. 1776. ALEXANDER *verſus* VAUGHAN.

Mr. *Dunning*, Mr. *Davenport*, and Mr. *Lucas* now ſhewed cauſe.

The general queſtion is, Whether a *Scotch* trader, occaſionally coming to *England*, and committing an act of bankruptcy, is entitled to the benefit of the laws againſt bankrupts *in England?* They argued he was not. That the deſcription of perſons who may become bankrupt by the ſtatute 13 *El. c.* 7. *ſtat.* 1 *Jac.* 1. *c.* 15. and *ſtat.* 21 *Jac.* 1. *c.* 19. is, "merchants or other perſons uſing "the trade of merchandize, *&c. being ſubjects born of this realm or* "*denizens.*" That one of the acts of bankruptcy ſpecified by the ſtatutes, is "*departing the realm*," which cannot be ſaid of a *foreigner*. That a *Scotchman*, ſince the union, is as much a foreigner in reſpect of theſe ſtatutes, which do not extend to *Scotland*, as any other alien; and therefore to ſay, that from the circumſtance of the plaintiff's trading *to England*, the bankrupt laws upon his arrival here immediately attach upon him, would be to make the bankrupt laws binding upon all the world. Such a conſtruction would alſo be attended with the moſt miſchievous conſequences, as it would be an encouragement to indigent foreigners to reſort to this country, merely for the purpoſe of clearing themſelves by a commiſſion, and highly injurious to their creditors, who might not even have notice of it till after the certificate was obtained.

Mr. *Wallace*, *contra*, for the defendant, inſiſted that the plaintiff was an object of the bankrupt laws. That by *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 15. "Strangers, as well as natural-born ſubjects and "denizens are expreſsly made liable to the bankrupt laws." A man born here, and eſtabliſhed in a foreign country in trade, coming over here, is liable to a commiſſion. An alien coming here is liable to be arreſted, and to all demands of creditors. He may aſſign all his effects for the benefit of his creditors, and there is no diſtinction between *Scotch*, *Iriſh*, *Dutch*, *French*, or any other alien. He cited *ex parte Smith*, from Mr. *Philip Carteret Webb*'s notes, before Lord *Hardwicke*, 23d *December* 1737. "*John Aſh-*"*ley* went from *England* in 1720, and reſided in *Barbadoes* till "1735, where he was a factor, and planter, and traded *to Eng-*"*land*, by ſending goods from his plantations, and receiving goods "back again bought in *England*; and diſpoſed of goods, ſent from "*England*

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" *England* to *Barbadoes*, for merchants in *England* as a factor; " and being greatly indebted, came to *England* in *April* 1737; " and committing an act of bankruptcy, a commiſſion iſſued:" Upon a queſtion, Whether he was within the ſtatutes of bankrupts, the caſe of *Sedgewick* verſus *Bird*, 1 *Salk.* 110. *Dodſworth* verſus *Anderſon*, 2 *Jones*, 141, 142. and *Raym.* 175. *S. C.* were there cited. Lord *Hardwike* ſaid—" If this point had not been " decided in *Sedgewick's* caſe he ſhould have doubted; but as it " was there decided, he held himſelf bound by that determina- " tion."—This doctrine was again recognized by Lord *Hardwicke* in a caſe *ex parte Williamſon*, 2 *Vez.* 249. 252. and 1 *Atk.* 82. *S. C.* In this latter caſe Lord *Hardwicke* treated it as a ſettled point, that a trader abroad, who has traded *to England*, coming over here, is an object of the bankrupt laws: his only doubt was, whether there was not ſome colluſion.—But it is clear there can be no colluſion in this caſe, becauſe the plaintiff himſelf diſputes the commiſſion.

Mr. *Mansfield* was going to argue on the ſame ſide; but Lord *Mansfield* ſtopped him, ſaying, he had rather hear what anſwer could be given to the authorities cited, and whether the court was not bound down by them.

Mr. *Dunning* and Mr. *Davenport* in reply, ſaid, that as to the caſe of *Sedgewick* verſus *Bird*, the matter did not undergo a diſcuſſion before the court upon argument, but was only held ſo on a trial at bar; which, in fact, was not of much higher authority than an opinion at *niſi prius*. And therefore it was more than probable, that the court did not, at the time, weigh the extenſive bad conſequences attending ſuch a determination. That that caſe, like the others, was moſt probably the caſe of an *Engliſhman* returning from abroad hither. That as to the caſes of *Aſhley* and *Williamſon*, they both ſubmitted to the commiſſion; and, therefore, it was but reaſonable that the creditors abroad ſhould have time to come in and prove their debts. They again inſiſted, that an actual reſidence in *England* was neceſſary to ſubject a man to the bankrupt laws, and that the particular act of bankruptcy deſcribed in the ſtatutes of " *departing the realm*," muſt mean a departing from the bankrupt's *home*; but it could never be ſaid that a perſon *not reſident* in *England*, departed from *England* as his home; much leſs could it be ſaid of a *foreigner*, who had never before been in *England* in his life.

Lord MANSFIELD.—There have been many things ſaid at the bar which have nothing to do with the queſtion now before the court. 1*ſt*, With what view the commiſſion was taken out? 2*dly*, With what

what view the plaintiff lay in prison, or why he now opposes the commission. 3*dly*, To what amount the plaintiff traded in *England*. 4*thly*, The instances of his trading in *England*. All these are out of the question. For supposing the general question to be with the plaintiff, I left the instances of trading to the jury, who thought they were not sufficient proof of the plaintiff's having traded in *England*, and as to that point, I gave the defendant leave to move for a new trial. The time of the plaintiff's being in *England* is also immaterial.

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The case is simply this; a merchant who has traded to *England*, but who is a native of, and constantly resident in, a country not subject to the *English* statutes concerning bankrupts, comes *occasionally* to *England*, is arrested, and lies in prison two months, which is an act of bankruptcy. The question is, Whether such person, having traded *to* England, not *in* England, is an object of the bankrupt laws?

The circumstance of a trader being a natural born subject, or a foreigner, makes no difference. The last section of *stat.* 21 *Jac.* 1. *c.* 19. expressly declares, that "strangers, as well as natural "born subjects and denizens, shall be subject to the bankrupt "laws;" and therefore it puts that point out of the case. But it still leaves the question, whether both natives and foreigners must not be traders in *England*.

I own, when the general question was started at the trial, I felt great objections, upon principles of justice, to the idea of a foreigner, occasionally coming here, being subject to the bankrupt laws. Whoever gives credit, gives it upon the property a man has in the country where the credit is given. I was also struck with the very inconvenient consequences that might arise in different parts of our dominions, if a trader might come over here behind the back of his creditors, hurry through a commission, and obtain his certificate, before his creditors abroad could even know the commission had issued. On the other hand, it appeared there was a locality in the description of the acts of bankruptcy, and that the trader, whether a native or foreigner, must be *in England* when he commits an act of bankruptcy. Therefore I determined not to give any binding opinion at *nisi prius*.

The case *ex parte Williamson*, 1 *Atk.* 82. did not strike me then, as it does now; for the opinion there given was not an opinion founded on any part of the case before the court. At the same time I never doubted but that many such commissions have issued, and that many persons have come from *Ireland* and the plantations, on purpose to get commissions taken out against themselves.

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ſelves. I recommended it therefore to the counſel to ſearch for caſes decided upon the point. That ſearch has been made, and ſeveral authorities have been produced.

I am confirmed in every objection that aroſe in my mind upon general principles, by what Lord *Hardwicke* ſays; but if in the year 1750 he did not think the matter entire, I think it is not ſo now. However it may ſtand upon principles, I think we are bound by the authorities. The caſes of *Dodſworth* verſus *Anderſon*, Sir *T. Raym.* 375. and *Sedgewick* v. *Bird*, 1 *Salk.* 110. are ſtrong authorities upon the ſubject. The firſt goes a great way: The court there ſay, "though it be found that the bankrupt bought "and ſold but *once in England*, it is *not neceſſary* that he ſhould do "ſo; for many merchants do only *buy beyond ſea*, and *ſell* here; "it is *trading* that makes a man capable of being a bankrupt, "and it is plain that *Grice* did trade *in England*." From what the court had juſt ſaid before, I take that to mean *to England*.

The caſe of *Sedgewick* verſus *Bird*, is much ſtronger: becauſe the bankrupt in that caſe never did any act of trade *in England*.

But the moſt material authority of all, is the caſe *ex parte Smith* in *Canc. Dec.* 25th, 1737, upon the bankruptcy of one *Aſhley*, who was never reſident *in England*, nor had ever traded *in England*. That caſe was ſolemnly argued before Lord *Hardwicke*, and the ſeveral caſes abovementioned were cited and relied on. The bankrupt came over on purpoſe to get the commiſſion taken out againſt him. The opinion given by Lord *Hardwicke* in that caſe is much ſtronger, becauſe he had no doubt that the commiſſion was fraudulent; and therefore he gave his opinion both againſt his inclination, and againſt what he thought the juſtice of the caſe. The words of his opinion are very ſtrong. "The "new laws relating to bankrupts have turned the edge of com-"miſſions of bankruptcy, from being, as they were *originally*, *re-*"*medial* to the *creditor*, and in the nature of *puniſhments* to the "*bankrupt*, whom they conſidered as an offender, to be the acci-"dental occaſion of great frauds. This has been the caſe here, "and I will, as far as I can, prevent the extending them to other "parts of the world. If the act of bankruptcy had been committed "abroad, to be ſure no commiſſion ought to go againſt him for "that act. The affidavits ſpeak only of his trading *to England*, "while he reſided at *Barbadoes*. If this point had not been de-"termined in *Sedgewick*'s caſe, I ſhould have doubted of it; but "that caſe is *in point*, and muſt govern this. However, I will ſuſ-"pend the allowance of the certificate till the creditors abroad "have an opportunity to ſend over proofs of their debts."

This

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This throws a different light upon the caſe *ex parte Williamſon* before Lord *Hardwicke* in the year 1750, which was 13 years afterwards; and ſhews, that he continued of the ſame opinion then, though the ſame point was not immediately in queſtion before him at that time.

Here the plaintiff traded *to England*, and never was a reſident trader *in England*, but came hither only *occaſionally*. The conſequence is, that a nonſuit muſt be entered.

The other judges concurred.

Per Cur. Verdict ſet aſide, and a nonſuit entered.

CAMERON *et al. verſus* REYNOLDS, Under Sheriff.

Monday, Feb. 5th.

All actions for *breach* of *duty* of the office of ſheriff, muſt be brought againſt the *high ſheriff*, though by default of the *under ſheriff* or *bailiff*.

THIS was a ſpecial action on the caſe, in which the declaration ſtated, that the plaintiffs had recovered a judgment againſt one *Fancourt*: That a *fi. fa.* was ſued out and delivered to the ſheriff, by virtue of which he ſeized and took goods and chattels to the amount of 90 *l.* 4 *s.* and aſſigned the goods to one *J. Brown*, in truſt for the plaintiffs. That the defendant at that time was *under-ſheriff*, and by *virtue of his office* ought to have executed to *J. Brown* a bill of ſale of the ſaid goods: That a bill of ſale was prepared, and the defendant was requeſted to ſign it, the *ſum* and all *fees* being offered to him: That the defendant refuſed to ſign it, and afterwards executed another bill of ſale to one *Richard Cavel*, and put him into poſſeſſion; by means whereof the plaintiffs were put to a great deal of expence in an application to the court of *B. R.* to cancel the ſaid bill of ſale to *Cavel*, and in keeping poſſeſſion pending the application, and in paying warehouſe rent. Plea, not guilty. Verdict for the plaintiff. Damages 60 *l.*

Cavel took poſſeſſion, kept it about a month, and received the money in the ſhop, to the amount of about 20 *l.* After quitting the poſſeſſion, *Cavel* brought an action againſt the plaintiffs and their ſervants, for ſeizing and taking the goods, and brought an action for keeping poſſeſſion of the houſe.

In order to put a ſtop to theſe actions, the preſent plaintiffs obtained a rule for the ſheriff to execute a bill of ſale to *J. Brown*, and that the bill of ſale to *Cavel* ſhould be cancelled: That *Cavel* ſhould account with *Brown* for the money received from the ſale of the goods in the ſhop, and that all further proceedings in the

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actions brought by *Cavel* againſt the preſent plaintiffs and one *Alexander Lobban* ſhould be ſtaid.

At the trial, the caſe made out on the part of the plaintiffs was as follows: The judgment and execution were proved, and that the *fi. fa.* was delivered to the defendant, then the *under-ſheriff*, who ſeized ſeveral goods under it; and, upon an application to him for that purpoſe, promiſed to execute a bill of ſale to the nominee of the plaintiffs, and ordered him to be put into poſſeſſion. That afterwards a bill of ſale was made out for him by order of the defendant, and the uſual fees paid. That the defendant was then required to execute it, but he refuſed, unleſs the money ariſing from the ſale was paid into his own hands. This the attorney for the plaintiffs refuſed to comply with; and made application to one of the high ſheriffs, offering to pay the money into the hands of a banker. The high ſheriff thinking it reaſonable, ſent a meſſage to the defendant, recommending him to execute the bill of ſale, and the plaintiffs then offered to pay the ſum for which the goods were ſold, and all fees to the defendant. But he abſolutely refuſed to do it, and executed a bill of ſale to *Cavel*. The rule of the court of *B. R.* abovementioned was then read, which was not founded upon a motion for an attachment againſt the defendant perſonally, or for miſbehaviour by him or the ſheriff, but was a rule for a ſpecific relief. Then the plaintiffs proved the coſts they had been put to in making that application, and their expence in keeping poſſeſſion of the goods.

Lord *Mansfield*, after reporting the caſe, ſaid, there were three points ſaved at the trial. 1*ſt*, Whether the action would lie againſt *Reynolds*, the *under-ſheriff*? 2*dly*, Whether the rule of court was not a bar to the action? 3*dly*, Whether his lordſhip did right in leaving the coſts to the jury in damages, as *Reynolds* was no party to the rule?

The rule that had been obtained was to ſhew cauſe why a nonſuit ſhould not be entered, or why the judgment ſhould not be arreſted, or why a new trial ſhould not be granted.

Mr. *Dunning* and Mr. *Buller* now ſhewed cauſe; and as to the firſt queſtion inſiſted, that though the action might have been brought againſt the high ſheriff, yet it alſo lay againſt the under-ſheriff, and in this caſe was properly brought againſt *him*, becauſe *he only* was in fault. For the high ſheriff, when applied to, was of opinion, and deſirous the bill of ſale ſhould be executed to the plaintiffs, but the defendant refuſed to execute it.—1 *Roll. Abr.* 94. *Pl.* 4. "An action lies by the demandant in a writ of en-

"try

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" try *fur diſſeiſin, if he pleaſes*, againſt the *under-ſheriff*, who has " received his fee to return a writ of ſummons, and does not re- " turn it". 1 *Leon.* 146. *pl.* 203. *S. C.* So againſt the *under-bailiff* of a *liberty*, who has levied the debt under a warrant upon a *fi. fa.* for *concealing the writ*. 1 *Ro. Abr.* 94. *Pl.* 5. So againſt an *under-ſheriff* for proceeding after a *habeas corpus* delivered. *Iplett* v. *Williams*, 3 *Leon.* 99. It is clear from theſe authorities, that the plaintiffs had it in their election to ſue *either*; and if ſo, the court would not in this caſe make the high ſheriff, who has done no fault, liable; and leave him to ſeek his remedy over againſt the under-ſheriff who was alone in fault.

As to the queſtion, whether a nonſuit ſhould be entered, or the judgment arreſted, they inſiſted, if the objection to the action lay at all, it was upon the face of the record; and therefore, the latter would be the proper rule.

Secondly, Suppoſing the action well founded, the rule for cancelling the bill of ſale to *Cavel* could not be taken into conſideration in this action; for it was a rule in another cauſe, *viz.* between *Cavel* and the plaintiffs.

Thirdly, The coſts were occaſioned by the defendant, and therefore ought to be included in damages upon this action; otherwiſe the plaintiffs would be ſufferers.

Mr. *Wallace* and Mr. *Davenport*, in ſupport of the rule, contended, that the high ſheriff was the perſon alone reſponſible to the plaintiffs. The law looks upon him only, and if he is a ſufferer by the miſconduct of the under-ſheriff, or any other of his officers, he has his remedy over againſt them. They admitted an action lay in the caſes cited; but there it was by virtue of the ſtatute of *Weſtminſter* 2. *c.* 39. and 28 *Ed.* 1. *c.* 16. and ſo it appears in *Dalton's Sheriff*, 483, 4. and Doctor and Student, *c.* 42. But *ſecondly*, Suppoſing the plaintiffs had their election in this caſe, the rule upon the former application is a complete bar to the action; becauſe under that rule the plaintiffs have already had a ſpecific relief. If ſo, they cannot have a double recompence for one and the ſame injury. *Thirdly*, The rule giving ſuch ſpecific relief being ſilent as to coſts, no action would lie for them; and therefore they ought not to have been conſidered in damages by the jury. In equity, upon a bill for a ſpecific performance, if the court upon the hearing do not give coſts, no action can be maintained for them afterwards. Here the court directed a ſpecific performance; therefore the plaintiffs are not entitled to coſts for non-performance too.—*Cur. adviſare vult.*

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CAMERON *verſus* REYNOLDS.

Lord *Mansfield* the next day, after ſtating the caſe, delivered the opinion of the court as follows: The *1ſt* objection is an objection upon the face of the declaration, that this action does not lie againſt the *under-ſheriff*, and therefore that judgment ought to be arreſted. As to that, we are all of opinion, the action does not lie againſt the under-ſheriff. It is an action brought againſt him for a breach of duty in the office of ſheriff. Wherever that is the caſe, the action muſt be brought againſt the high ſheriff, as for an act done by him; and if it proceeds from the default of the under-ſheriff or bailiff, that is a matter to be ſettled between them and the high ſheriff.

An action does not lie againſt the ſheriff upon a promiſe to execute a bill of ſale to the plaintiff's nominee.

The next objection which ariſes on the face of the declaration is, that the *giſt* of the action is, the defendant's having refuſed to execute a bill of ſale to the *nominee* of the plaintiffs, *contrary* to his *promiſe* ſo to do, and in *breach of his office*. As to that, it is no part of the duty of the office of ſheriff to execute a bill of ſale at an *appraiſed value*. It might be very inconvenient and highly injurious to defendants if it were. The legal and proper mode of compelling a ſale by the ſheriff, where he makes delay or refuſes, is by writ of *venditioni exponas*; upon which he muſt return the money into court. But he is not compellable to execute a bill of ſale to the plaintiff's nominee, becauſe he has promiſed to do ſo. Theſe objections go in arreſt of judgment.

A rule of court, giving *ſpecific relief*, in a caſe where, by law, the party is not entitled to two different remedies is a bar to an action for the ſame cauſe.

Another objection is, ſuppoſing the action would well have lain againſt the defendant, whether or no the plaintiffs have not precluded themſelves from bringing this action; having complained againſt the high ſheriff by motion, and upon ſuch motion obtained an adequate recompence by rule of court. As to that point, the caſe was this; the plaintiffs not having the bill of ſale, could not maintain an action againſt the ſecond vendee for the goods, or for the profits of the ſhop while he continued poſſeſſed: For the ſame reaſon, they could not defend themſelves againſt the actions brought by the ſecond vendee againſt them. Therefore they applied to this court, by motion againſt the high ſheriff, for a rule to ſhew cauſe why the bill of ſale to *Cavel* ſhould not be cancelled, and a new bill of ſale executed to the plaintiffs, upon the ground of the defendant having agreed ſo to do. All the facts upon which this motion was founded, were acts of the defendant *Reynolds*, which the plaintiffs, in their application to the court, looked upon as the acts of the *high ſheriff*, and not as the acts of *Reynolds*. Upon hearing all parties, the court gave the plaintiffs a *ſpecific relief*, by ordering the latter bill of ſale to be cancelled, and directing the

execution

execution of the former. After that, a man ſhall never be ſuffered to purſue a ſecond recompence. Beſides, part of the rule of the court upon the application was, that "all further proceedings ſhould be ſtaid." It is not like caſes where two different remedies are given by the law: for inſtance, where an arreſt is illegal; for there the court only correct the irregularity, and leave the party to bring his remedy for the falſe impriſonment, which the court cannot give without conſent. But in this caſe, where the whole proceedings are againſt the high ſheriff, and ſo conſidered by the plaintiffs themſelves, who make the application to the court, they ſhall be bound.

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CAMERON *verſus* REYNOLDS

I thought yeſterday it was material that the defendant was not a party to the rule, but I am ſatisfied now that there is nothing in that objection.

The queſtion that ariſes upon theſe two points, one of which is a ground for arreſting the judgment, and the other for a nonſuit, is what the court ſhould do? If we order a nonſuit to be entered, the plaintiff muſt pay the defendant his coſts; but if we arreſt the judgment, each party muſt pay their own coſts. Upon the whole, taking all the circumſtances and complexion of the caſe into conſideration, we think the defendant ought to prevail upon the motion in arreſt of judgment, more eſpecially as it appears upon the declaration that he might have demurred.

Where a plaintiff is non-ſuited the defendant is entitled to coſts. Where judgment is arreſted, each party pays his own coſts.

Per Cur. Judgment arreſted.

Lord *Mansfield* added, that the proper mode would have been for the defendant to have applied to the court to ſtay the proceedings in this action.

SAYER *verſus* POCOCK.

Tueſday, Feb. 6.

MR. *Wallace* ſhewed cauſe againſt a rule to amend the record in this caſe after verdict, by adding the words, "and the "defendant does ſo likewiſe," at the end of the replication, inſtead of "*&c.*" A prior motion had been made for a rule to ſhew cauſe why the judgment ſhould not be arreſted, upon the ground of there being in fact no iſſue joined, in conſequence of the above defect.

Replication amended after verdict, by inſerting the *ſimiliter* inſtead of *&c.*

The action was an action on a ſheriff's bond, brought by the plaintiff againſt his bailiff. Plea, performance of the conditions generally. Replication that one *Groves* recovered judgment in another cauſe, and that the defendant ſuffered an eſcape, by which

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attachments iſſued againſt the plaintiff. Another breach aſſigned was in not returning the writ. Upon one breach the defendant let judgment go by default. And on the other, the *ſimiliter* was not added. But upon this, the cauſe went down to trial, and a defence was made. He cited 1 *Str.* 641. where upon this objection taken it was held not amendable, and the judgment arreſted.

ASTON Juſtice. There is a caſe of *Cowper* v. *Spencer*, 8 *Mod.* 376. where the plaintiff replied *de injuria ſua propria*, concluding to the country without any *ſimiliter* added: the court there held it was no iſſue: but it does not appear in that caſe, that *abſque tali cauſa* was added; nor that the concluſion to the country was followed by an "*&c.*" But here the plaintiff has added, *&c*; conſequently he meant ſomething by it. Again, in the caſe of *Cowper* v. *Spencer*, 8 *Mod.* 376. * it does not appear whether any defence was made or not. But here there was a defence made. If the *&c.* added in this caſe could be conſtrued to ſupply the place of the *ſimiliter*, it would only be iſſue misjoined and cured by the ſtatutes of *jeofails*. But if it cannot be ſo conſtrued, then it is not within the ſtatutes of *jeofails*, and the only queſtion is, whether it is amendable.

* This is the ſame caſe as in *Str.* 641.

Mr. *Dunning*, and Mr. *Davenport*, in ſupport of the rule, ſtated the proceeding to be thus: Two breaches were aſſigned under the *ſtat.* 8 and 9 *Wm.* 3. *c.* 11. To the firſt the *ſimiliter* was added; to the latter only "*&c.*" and in this form the paper-book was returned to the clerk of the papers. It was, in fact, therefore, his miſtake. For upon the paper-book being returned the clerk is warranted to add the *ſimiliter*, and award of *venire*, and every thing neceſſary for the trial. By returning the paper-book, therefore, the defendant is precluded from taking any objection; and cited *Gilbert*'s Hiſtory, *C. B.* 152, 153.

Lord MANSFIELD. One is aſhamed and grieved that ſuch objections remain. They have nothing to do with the juſtice of the caſe, but only ſerve to entangle, without being of the leaſt aid in preventing irregularity.

Without conſidering whether it is within the ſtatutes of *jeofails*, or not, it is beſt to amend to avoid a writ of error; and there are three grounds which ſatisfy me that the matter in this caſe is amendable. 1*ſt*, That it is an omiſſion of the clerk. 2*dly*, I will in this caſe adopt the reaſoning of *Lord Coke*, and conſtrue "*&c.*" to mean every neceſſary matter that ought to be expreſſed †. 3*dly*, By amending, the court only make *that* right, which the

† *Vide Co. Lit.* 17. b.

the defendant himſelf underſtood to be ſo, by his going down to trial. 1776.

The three other judges concurred.

SAYER *verſus* POCOCK.

Per Cur.—Rule to amend abſolute, and rule for arreſting the judgment diſcharged.

BRUCKSHAW *verſus* HOPKINS.

Thurſday, Feb. 8th.

Plaintiff allowed to bring back the *venue* after plea pleaded.

MR. *Willes*, on the part of the defendant had moved to diſcharge a rule obtained laſt term by Mr. *Buller*, on behalf of the plaintiff, for bringing back the *venue* to *London*, where it was originally laid, upon undertaking to give material evidence in *London*.—Mr. *Willes*'s objection was, that the application for bringing back the *venue* was too late.

The facts were, that, after the *venue* had been changed from *London* to *Lincolnſhire* by the defendant, upon the common affidavit, the cauſe had gone down to trial at *Lincolnſhire* aſſizes, when the plaintiff was nonſuited. This nonſuit had been afterwards ſet aſide, and a new trial directed. Accordingly, the cauſe went down a ſecond time to the aſſizes at *Lincoln*, to be tried before a ſpecial jury, but, for defect of jurors, was made a *remanet*. Mr. *Willes* inſiſted, that, after all theſe proceedings, the plaintiff could not bring the *venue* back to *London*; and cited *Dickenſon* v. *Fiſher*. 2 *Str.* 858.

Lord MANSFIELD.—The Maſter ſays, he takes the practice to be according to the caſe in 2 *Strange*. 858. But it comes to the ſame thing: For the plaintiff may at any time move to amend his declaration by altering the *venue* *.

It was adjourned for the maſter to conſider whether the plaintiff could bring back the *venue after plea pleaded*.

Lord *Mansfield* now delivered the opinion of the court.

We deſired the Maſter to inquire into the practice, and conſider, Whether the plaintiff could not bring back the *venue after plea pleaded*: The Maſter has accordingly inquired and conſidered about it; but he has not met with any thing material to the point in queſtion, except the caſe cited from 2 *Str.* 858, and two caſes upon amendment, 2 *Str.* 1,162. *Stroud* v. *Tilly*, and 2 *Str.* 1,202. *Rivet* and others v. *Cholmondeley*.

* *N. B.* That muſt be upon a rule to ſhew cauſe.

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BRUCKSHAW *verſus* HOPKINS.

We think it would be an idle circuity to put the plaintiff to move to amend his declaration, in order to come at an alteration of the *venue*; and if we permit him *now* to bring it back, he does it at his peril; becauſe, if he does not give material evidence in *London*, he muſt be nonſuited; and if it ſhould appear to be a local action by ſtatute, he will be nonſuited upon the opening.

The conſequence is, that the former rule muſt ſtand, and Mr. *Willes* will take nothing by his motion.

Friday, Feb. 9th.

DENN *ex dim.* GEERING, *verſus* SHENTON.

IN ejectment for the recovery of certain lands in the county of *Berks*, upon not guilty pleaded, the jury found a verdict for the plaintiff ſubject to the opinion of the court upon the following caſe.

William Geering, being ſeiſed in fee of the premiſes in queſtion, by his will of the 28th of *November* 1738, deviſed the ſame as follows: "I give and bequeath to my grandſon, *Samuel Shen-* "*ton*, all that my meadow ground called *Picked mead*, lying and "being in the pariſh of *Denchworth* in the county of *Berks*, *to* "*hold* unto the ſaid *Samuel Shenton*, and the *heirs of his body* law- "fully to be begotten, and *their heirs for ever*, chargeable never- "theleſs, and *charged* with the payment of *eight pounds* a year unto "my niece *Mary Stevenſon* the elder, during her natural *life*, to be "paid her by quarterly payments: But *in caſe* the ſaid *Samuel Shen-* "*ton ſhall die without leaving iſſue of his body, then* I give and deviſe "the ſaid meadow ground unto my nephew *William Geering* ſon "of Mr. *William Geering*, of *Denchworth* aforeſaid, to hold unto "the ſaid *William Geering* the ſon, and *his heirs for ever*, charge- "able as aforeſaid, and alſo chargeable with, and ſubject to, the "payment of *one hundred pounds*, of lawful money of *Great Bri-* "*tain*, unto my niece *Ann Beale*, *within one year next after* the "ſaid *William*, *or his heirs*, ſhall be poſſeſſed of the ſaid meadow "ground."

"All the reſt and reſidue of my goods, chattels, real and per- "ſonal eſtates whatſoever, after the payment of debts, legacies, "and funeral expences, I give, deviſe, and bequeath unto my "grandſon *Samuel Shenton*, *his heirs*, executors, adminiſtrators, "and aſſigns."

The ſaid *William Geering* the teſtator died in 1739.

The ſaid *Samuel Shenton* the grandſon entered and died ſeiſed, *leaving iſſue Samuel Shenton* the younger, his only child, who alſo entered and died ſeiſed.

Samuel

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DENN *ex dim.* GEERING *verſus* SHENTON.

Samuel Shenton, the perſon laſt ſeiſed, attained 21, and died in 1768, having made his will, dated 23d *April* 1767, and thereby deviſed the premiſes to his mother, the defendant, *Mary Shenton*, and her heirs and aſſigns for ever, who entered, and is now in poſſeſſion thereof under the ſaid deviſe.

The leſſor of the plaintiff is the nephew of the teſtator *William Geering*, and ſon of *William Geering* of *Denchworth* in *Berkſhire*, mentioned in the will of the teſtator *William Geering*.

The queſtion for the opinion of the court is, Whether the leſſor of the plaintiff had a good title to recover the lands deviſed, in the ejectment mentioned?

Mr. *Baldwin* for the leſſor of the plaintiff ſtated the queſtion to be, whether *Samuel Shenton* took an eſtate *tail*, or an eſtate in *fee*; and inſiſted he took an *eſtate tail*. He cited 1 *Ventr.* 225. *King* verſus *Melling*. 1 *P. Williams* 664. and 1 *Leon.* 285. where cited, which he ſaid was exactly this caſe; alſo 2 *Bur.* 1,100. *Doe* on the demiſe of *Long* verſus *Laming*.

Mr. *T. Cowper contra* contended, that the clear intention of the teſtator was to give the children of *Samuel Shenton* the elder a fee; and if ſo, the words "heirs of the body" might be conſtrued to be words *of purchaſe*, or words of *limitation according to ſuch intent*: That it had been expreſsly ſo held in the caſe cited from 2 *Bur.* 1,100. which he ſaid was the only caſe he ſhould take notice of, becauſe it was exactly in point for the defendant. There the deviſe was to *M. R. and the heirs of his body* lawfully begotten, and to *their heirs and aſſigns for ever*: The court ſaid "the intention "of the teſtator was to give the children of *M. R. a fee*," and accordingly conſtrued the words *heirs of the body*, to be *words of purchaſe*. Here the words "*their heirs for ever*," plainly ſhew the teſtator meant the iſſue of *Samuel* ſhould take a fee. But another ſtrong circumſtance is, the legacy of 100 *l.* deviſed to his niece in caſe *Samuel* ſhould die without leaving iſſue. Of neceſſity, therefore, the teſtator muſt mean a dying without iſſue at *the time of his death*; for if he intended ſhe ſhould wait till *a total failure of iſſue*, ſhe might wait for an hundred years, or for ever.

Lord *Mansfield* aſked Mr. *Cowper* if he knew of any caſe, where upon a limitation of *lands*, upon a dying without iſſue, thoſe words had been confined to a dying without iſſue *living at the time of the death*. The diſtinction is, between a deviſe of lands and perſonal eſtate: in the latter caſe, the words are taken in their vulgar ſenſe; that is, *dying without leaving iſſue at the time of his death*.

1776.

DENN *ex dim.* GEERING *verſus* SHENTON.

* *Vide* Nicholſon *verſus* Hooper, 1 *P. Wms.* 199.—Target *verſus* Gaunt, 1 *P. Wms.* 432.—Pinbury *verſus* Elkin, 1 *P. Wms.* 563.—Forth *verſus* Chapman, 1 *P. Wms.* 667.

death. In the former, they are taken in a legal ſenſe; and that is, *whenever there is a failure of iſſue* *.

Mr. *Cowper* named no ſuch caſe, but dwelt on the abſurdity of the deviſe to "*their heirs for ever*," if the intention was not to give a fee.

Lord *Mansfield*, after ſtating the caſe, ſaid, the queſtion is, whether the grandſon took an eſtate tail, or an eſtate in fee? Now the deviſe is to *Samuel Shenton*, and the *heirs of his body*, and *their heirs for ever*. But the words "*their heirs for ever*," are *qualified* by the ſubſequent words, "in caſe he ſhall die *without* "*leaving iſſue*," which clearly ſhew it to be an eſtate tail; and then, the teſtator gives it over to the leſſor of the plaintiff. It is too clear to admit of a doubt.

The three other judges concurred.

Per Cur. *Poſtea* delivered to the plaintiff.

Same day.

REX *verſus* HART, Eſq.

MR. *Davenport* moved for directions to the Maſter to ſtrike out twenty-four of the ſpecial jury *ex parte*, in caſe the defendant and his agents ſhould omit to attend the Maſter's next appointment. The motion was founded on an affidavit of three appointments having been made, and their declining to ſtrike out *till a day ſhould be appointed for the trial.*

The ſpecial jury had been nominated in laſt term: But the twenty-four had not been ſtruck out by the parties. And the cauſe was not then tried; but was intended to be tried at the ſittings after this term. The defendant's attorney attended the Maſter's third appointment to ſtrike out, but declined doing it for the reaſon abovementioned.

Lord *Mansfield* was clear the Maſter might do it without any direction from the court; and declined giving him any in particular, but had no doubt he might do it now, juſt as if he had proceeded laſt term; and that it was right for him to act as uſual, unleſs there ſhould appear any particular reaſon to the contrary.

In the preſent caſe there had happened no change of ſheriffs: which, as Lord *Mansfield* obſerved, had been given as a reaſon why the ſame jury ſhould not ſerve for the trial of the cauſe, which had been already ſtruck for a former intended trial. But he ſaid, he did not ſee the reaſon why the change of the ſheriffs in the mean time, ſhould make any difference.

Mr.

Mr. *Wallace* ſaid, the Court of *Common Pleas* had lately determined that it ſhould be ſo, and that the change of the ſheriffs makes no difference. 1776.

REX *verſus* HART.

Lord *Mansfield* ſaid, he was glad of it.

REX *verſus* the Churchwardens of TAUNTON St. JAMES.

Saturday, Feb. 10th.

Return to a *mandamus* that *L. C.* was not duly *elected* ſexton according to ancient *cuſtom*; that there is a cuſtom for the inhabitants, *&c.* to *remove* at *pleaſure*, and that *L. C.* was *removed* purſuant to ſuch *cuſtom*, is good.

THIS was a return to a *mandamus*, directed to *John Ridge* and *Luther Trott*, churchwardens of *Taunton St. James* in *Somerſetſhire*, to reſtore *Lewis Cogan* into the place and office of ſexton of the ſaid pariſh.

They returned, that *Lewis Cogan* was *not*, according to the ancient cuſtom of the ſaid pariſh, *duly elected*, and ſworn into the ſaid place and office, as by the writ is ſuppoſed: and further they returned, a *cuſtom immemorial* for the churchwardens and inhabitants paying ſcot, and bearing lot, or the major part of them to aſſemble and elect a ſexton for the ſaid pariſh; which perſon, ſo elected ſexton, the churchwardens and inhabitants paying ſcot and bearing lot, or the major part of them, for that purpoſe aſſembled in veſtry in the pariſh church, have for time beyond memory, been *uſed* and accuſtomed to *remove*; and ſtill of right ought to remove from his ſaid office, *at their will and pleaſure*: and then they returned a diſcharge and *removal* of the ſaid *Lewis Cogan* from the ſaid office of ſexton, purſuant to the cuſtom; and, therefore, that they could not reſtore him.

Mr. *Alleyne* objected, that this return was bad as being inconſiſtent; for it ſhews that the ſexton was *not well elected*, and yet that he was *regularly turned out*, which is repugnant; and if ſo though one part of the return be good, the court will award a peremptory *mandamus*: *Regina* verſus *Mayor and Aldermen of Norwich*, 2 *Ld. Raym.* 1,244.

Mr. *Buller contra*: Both parts of the return are true; and they are not repugnant or inconſiſtent. The writ ſuppoſes he was elected according to the cuſtom. To this it is returned, that he was *not duly elected according to the cuſtom*. And they further ſhew a cuſtom, to *remove* the ſexton at *pleaſure*, and that they have ſo removed him. This is no repugnancy: for he might be elected *in fact*, though *not duly* according to the ancient cuſtom: and, therefore, they had a right to remove him. *Wright* verſus *Fawcett*, *Eaſter* 7 *Geo.* 3. *B. R.* ſince reported in 4 *Bur.* 2,040.

Lord

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REX *verſus* Churchwardens of TAUNTON St. JAMES.

Lord MANSFIELD.—I ſee no inconſiſtency or repugnancy at all. They return that *Lewis Cogan was not duly elected.* But as it was clear he had been *in poſſeſſion* of the office, whether duly elected or not, the return goes on and ſtates, "*a cuſtom* in the "pariſh to *remove* their ſexton *at pleaſure*; and that in purſu- "ance of ſuch cuſtom, and agreeably thereto, they had *actually* "*removed* him." Now where is the repugnancy of this return? If he was *not* duly elected, he certainly has no right to be reſtored. But whether duly elected or not, they ſhew a right by cuſtom to remove him at pleaſure, and that they have done ſo. There is no repugnancy in ſaying, that he was *not duly* elected, but that being *in fact* elected, they had according to an ancient cuſtom removed him from the office. In either caſe they were equally entitled to exerciſe that right. Therefore, let the return be allowed.

The three other Judges concurred.

Monday, Feb. 12th.

LINDON *verſus* HOOPER.

An action for money had and received does not lie to recover back money paid for the releaſe of cattle damage feaſant, though the diſtreſs were wrongful.

UPON a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Mr. Juſtice *Aſhhurſt* read his report as follows: This was an action for money had and received brought by the plaintiff againſt the defendant *Hooper*, who had *diſtrained* the plaintiff's cattle. The plaintiff inſiſted he had a right of common, and demanded his cattle to be reſtored, which the defendant refuſed to do, unleſs the plaintiff would pay him 20*s.* for the damage done. Upon this, the plaintiff paid the money in diſpute for the releaſe of his cattle; and the action is brought for that money. At the trial the queſtion was, whether the plaintiff was entitled to recover back the money ſo paid, by this ſpecies of action? My opinion was, that he could not; for it would be extremely inconvenient and hard if a defendant ſhould, upon his parol be obliged to come and defend himſelf againſt any right that a plaintiff might ſet up, without giving him notice; and accordingly the plaintiff was nonſuited.

Mr. *Manſfield* ſhewed cauſe, and inſiſted that an action for money had and received, was not the proper method to try *this* right. 1ſt. Becauſe upon the general iſſue, five or ſix different queſtions and matters of right might be involved, without any notice to the defendant, or intimation on the face of the record, how many and which of them were intended to be tried; or to which

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which in particular it would be neceſſary for him to apply his defence. Conſequently he might come totally unprepared; and if not, yet the law will not intend a party to be prepared, unleſs he is legally appriſed by the record of what he is to defend. 2dly. The verdict itſelf will not decide the right; but only the immediate matter in diſpute between the parties: And not even that, at any conſiderable diſtance of time. For as nothing appears on the record reſpecting the right, or even that the right itſelf came in queſtion; it might happen upon a future diſpute, even between the ſame parties, that the witneſſes might be dead, and no trace might be to be found by which it could be aſcertained how the right was determined. So that in ſuch an action, the defendant would not only be put to the greateſt difficulties in eſtabliſhing his right; but after all, the remedy, if he ſhould ſucceed, would prove inadequate. On the other hand, if *replevin* or *treſpaſs* had been brought, either of which would have been the proper action to try this queſtion; the defendant would have had full notice by the pleadings how to ſhape his defence, and the record after verdict and judgment would have been deciſive of the right. But it will perhaps be inſiſted, that though replevin or treſpaſs were open, yet the plaintiff had a right alſo to bring this action; and, therefore, was at liberty to make his election between them. But this is not like any of thoſe caſes, where a party having different remedies, may elect to ſue either. In *Moſes* v. *Macfarlan*. 2 *Bur*. 1,006. the defendant compelled the plaintiff to pay the money againſt his own expreſs agreement not to do ſo. In *Feltham* v. *Terry* *, it was the only action that could be brought. In *Aſtley* v. *Reynolds*, 2 *Str*. 915. the money was extorted from the defendant under dureſs of his goods: And, no doubt, exaction or extortion of money is a good ground to ſupport an action for money had and received. In *Sadler* v. *Evans* †, the only queſtion was, whether this action lay againſt an *agent* for money received by him on account of his *principal*, and bears no ſimilitude to the preſent caſe. In Sir *Richard Newdigate* v. *Davy*. 1 Lord *Raym*. 742. there could be no other action. But none of theſe authorities come near the preſent. The queſtion here is a queſtion of *right*; and either *replevin* or *treſpaſs* would have been the proper remedy.

* *Eaſter* 13 *Geo*. 3. *B. R.*

† Since reported in 4 *Bur*. 1984.

Mr. *Morris* and Mr. *Buller*, *contra*, inſiſted, that the payment in this caſe was a *compulſory* payment on the plaintiff for the releaſe of his cattle, which had been wrongfully impounded; and, therefore,

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therefore, recoverable in this action. For wherever a party demands money *without right* and by compulſion, an action for money had and received will lie, notwithſtanding there may be other actions open to the plaintiff.

But it is objected, that upon this form of action, the defendant could have no *notice*, what queſtion was to be litigated. If he had not, it was his own fault: For on the demand of the cattle by the plaintiff, he told the defendant he had a right of common. The defendant denies he had ſuch right, and inſiſts upon a ſum of money as a conſideration for the cattle being releaſed. It is, therefore, not true that the defendant had no notice; for he knew the grounds upon which he demanded the plaintiff's money; conſequently he knew what he was to defend himſelf againſt.

Objection 2d. That replevin or treſpaſs was the only proper action in this caſe.—Anſwer; the party may chuſe his action for money had and received. In *Aſtley* v. *Reynolds*, 2 *Str.* 915. detinue or trover was open to the plaintiff; yet this action was held to lie.—In *Howard* v. *Wood*, Sir *Thomas Jones* 126-7. and *Arris* v. *Stukeley*, 2 *Mod.* 260. it was held, "that "*indebitatus aſſumpſit* lies for the profits of an office:" In both thoſe caſes, every objection now made was inſiſted on and overruled by the court. The queſtion to be tried was, Whether the grant of the office was good or bad; but that did not appear from the form of the declaration; nor was it poſſible for the defendant to be appriſed what title the plaintiff intended to ſet up. Again it was not the only remedy; for an aſſize will lie for an office. Therefore, theſe authorities are expreſsly in point.

The queſtion in the preſent caſe is, Who had a right to the money? If it was the plaintiff's right the action is well brought; for an action for money had and received will lie wherever it is due *ex æquo et bono*. The very giſt of the action is, that the defendant is obliged by the ties of natural juſtice to refund the money.

In *Feltham* v. *Terry*, the court held that treſpaſs would have lain if the defendant had elected to purſue that ſpecies of remedy. The words of the court were theſe; "it is manifeſt that "the taking was tortious, and that the plaintiff might have "brought an action of treſpaſs. But we all think he may wave "the *tort*, and go for the money clearly due: And if he does, "it is a benefit to the defendant: Becauſe he can then recover "no more than in equity he is bound to receive."

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In all the caſes cited, the objection as to want of notice was equally applicable; and ſo it muſt be in every action for money had and received. Sir *Richard Newdigate* v. *Davy*, 1 Lord *Raym.* 742. *Moſes* v. *Macfarlan*. *Aſtley* v. *Reynolds*. *Sadler* v. *Evans*. But notwithſtanding that, the fact is that this action is always moſt favourable to the defendant; for whatever defence he can ſhew to rebutt the plaintiff's title may be given in evidence on the general iſſue.

In another reſpect too this action in the preſent caſe is particularly favourable to the defendant; for he had a right to deduct any expence he might have been at on account of the cattle; which he could not have done if treſpaſs had been brought. Therefore, upon the authorities, as well as upon the reaſon and juſtice of the caſe, the plaintiff is intitled to recover in this action.

Lord *Mansfield* now ſtated the caſe from the report of Mr. Juſtice *Aſhhurſt*, from which I collected this additional circumſtance not before mentioned; namely, that the defendant agreed to return the money if the plaintiff ſhould make out his right; and then his Lordſhip proceeded to deliver the opinion of the court as follows:

The particular circumſtances of a promiſe or agreement to return the money, if the plaintiff ſhould make out his right, do not diſtinguiſh this caſe from the general queſtion: They relate to an amicable ſettlement which never took place.

The queſtion then is general; Whether the proprietor of cattle diſtrained, doing damage, who has paid money to have his cattle delivered to him, can bring an action for that money as had and received to his uſe?

Though, after the cauſe is brought before the jury, an objection to turn the plaintiff round, if the *merits* can be fully and fairly tried in the action brought, is unfavourable; yet, if founded in law, it muſt prevail. We were extremely loath to allow it without full conſideration.

The preſent caſe is ſingular, and depends upon a peculiar ſyſtem of ſtrict poſitive law.

Diſtraining cattle, doing damage, is a *ſummary execution* in the firſt inſtance. The diſtrainer muſt take care to be *formally* right; he muſt ſeize them in the act; upon the ſpot: For if they eſcape, or are driven out of the land, though after view, he cannot diſtrain them. He muſt obſerve a number of rules in relation to the impounding and manner of treating the diſtreſs.

The law has provided two preciſe remedies for the proprietor of cattle which happen to be impounded.

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1st, He may replevy: And, if he does, upon the avowry, he must specially set out a right of common, or some other title, as a justification of the cattle being where they were taken. Or,

2dly, If he does not chuse to replevy, but is desirous to have his cattle immediately re-delivered, he may make amends, and then bring an action of trespass for taking his cattle; and particularly charge the money so paid by way of amends, as an aggravation of the damage occasioned by the trespass. If to such an action the distrainer pleads that he took them doing damage, the plaintiff must specially reply the right or title which he alleges the cattle had to be there.

If instead of an action of trespass, an action to recover back the money so paid by way of amends might be brought at the election of the plaintiff; the defendant would be laid under a great difficulty. He might be surprised at the trial: He could not be prepared to make his defence; he could not tell what sort of right of common or other justification the plaintiff might set up. The plaintiff might shift his prescription as often as he pleased; or he might rest upon objections to the regularity of the distress. The plaintiff can never be suffered to elect to throw such a difficulty upon his adverse party. Besides, as applied to the subject matter of this question, the action for money had and received could never answer the equitable end for which it was invented, and deserves to be encouraged. For the point to be tried and determined in this action is, Whether the plaintiff's cattle trespassed upon the defendant's land? That may depend upon the plaintiff's right or the defendant's right, or the fact of trespassing: Or it may depend upon mere *form*. If the distress was irregular, the amends must be recovered back again: So that, allowing the owner of the cattle to substitute this remedy in lieu of an action of trespass, would, as between the parties, be unequal and unjust; and upon principles of policy would produce inconvenience. It would break in upon that branch of the common and statute law which relates to distresses. It would create inconvenience, by leaving rights of common open to repeated litigation, and by depriving posterity of the benefit of precise judgments upon record.

As to prescriptive rights of common, the money paid by way of amends is a *special damage*; and is always so alleged in the declaration of trespass, which in every view is the action *peculiarly proper* for this kind of question.

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An action for money had and received is a *new experiment*. No precedent has been cited. This objection alone would not be concluſive; but upon principles of private juſtice and public convenience, we think the method of proceeding uſed and approved for ages, in the caſe of diſtreſſes, ought to be adhered to.

There is a material diſtinction between this and the inſtances alluded to at the bar, where the plaintiff is allowed to *wave* the *treſpaſs*, and bring the action for *money had and received*. In *thoſe* inſtances, the relief is more favourable to the defendant. He is liable only to refund what he has actually received, contrary to conſcience and equity. In *this*, informalities, in taking or treating the diſtreſs, would avoid the amends, though the defendant had a right to diſtrain. But, which is more material, in *thoſe* inſtances, the plaintiff, by electing this mode of action, eaſes the defendant of *ſpecial pleading*, and takes the riſk of being ſurpriſed upon himſelf. In *this*, he eaſes himſelf of the difficulty and preciſion of ſpecial pleading, and the burthen of proof conſequent thereupon; and expoſes the defendant to uncertainty and ſurpriſe.

The caſe of *Feltham* verſus *Terry*, *Paſch.* 13 *Geo.* 3. *B. R.* relied on in the argument, was a caſe of goods taken in execution, and ſold under a warrant of diſtreſs upon a conviction. The conviction was quaſhed, conſequently there could be no juſtification. The plaintiff, by bringing his action for money had and received, could only recover the money for which the goods were ſold. But, if treſpaſs had been brought, the defendant muſt have pleaded ſpecially, and the plaintiff might have recovered damages far beyond the money actually received from the ſale of the goods. So, where goods are taken in execution, which are not the property of the perſons againſt whom execution is taken out; the owner may wave the treſpaſs, and bring his action for the amount of the money which the goods ſold for.

We think this caſe not within the *reaſon* of any, in which, hitherto, the plaintiff has been allowed to wave the *treſpaſs*, and bring this action.—We think, to allow it, would not tend to the furtherance of liberal juſtice, but would be a prejudice to the defendant, and in a public view, inconvenient. Therefore, we agree that the plaintiff was rightly nonſuited at the trial.

Per Cur. Rule for a new trial diſcharged.

THE END OF HILARY TERM.

THE END OF THE FIRST VOLUME.

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REPORTS

OF

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FROM

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TO

TRINITY TERM, the 18th of GEORGE III. 1778.

Both Inclusive.

By HENRY COWPER, Esq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

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EASTER TERM

16 GEORGE III. B. R. 1776.

DOE *ex dim.* DAVIS *verſus* SAUNDERS.

Tueſday, April 30th. 1776.

IN ejectment for certain lands in *Edmonton*, in the county of *Middleſex*, upon not guilty pleaded, the jury found a verdict for the plaintiff, ſubject to the opinion of the court on the following caſe.

N. B. Mr. Juſtice *Aſhurſt* was abſent the whole of this term at *Bath*.

That *Robert Everden* being ſeiſed in fee of the premiſes in queſtion, and of other lands (copyhold), deviſed the lands in queſtion, *viz.* a freehold meſſuage and premiſes in *Church-ſtreet* in *Edmonton*, and alſo a parcel of land copyhold in *Barrowfield* in the ſaid pariſh, containing about half an acre, to his ſon *Henry Everden* and his wife *Elizabeth*, for their joint lives, and the ſurvivor of them, and after the deceaſe of the ſurvivor, to their eldeſt ſon and his heirs for ever; and if they have no male iſſue, then to their daughters and their heirs for ever: and if they die without iſſue, then *to his right heirs for ever*. Afterwards he gave to his ſon-in-law *Humphry Davis*, his heirs, executors, adminiſtrators, and aſſigns for ever, *all and every his freehold and copyhold eſtate and eſtates*, tenements and premiſes thereunto belonging, not therein before deviſed, to have and to hold to him, his heirs, and aſſigns for ever, upon truſt to ſell the ſame, ſo ſoon as conveniently might be after his deceaſe: and after payment of ſo much of his debts, funeral and other expences, as his perſonal eſtate, before deviſed for that purpoſe, ſhould not be ſufficient to diſcharge, to pay certain legacies to his children, and the *reſt, reſidue*, and *remainder thereof equally to divide amongſt his children ſhare and ſhare alike*. And then he deviſed "*all the reſidue and* "*remainder of his eſtate, both real and perſonal, to his ſon-in-law*

One deviſes a *reverſion* to his *right heirs*, and afterwards gives all the *reſidue* and remainder of his real and perſonal eſtate to *A. B.* in fee. The *reverſion* does not paſs by the reſiduary deviſe.

1776. "the said *Humphry Davis*, his heirs, executors, administrators, "and assigns for ever."

DOE *versus* SAUNDERS. *Henry Everden* and his wife survived the testator, and died without ever having had issue.

The testator had six copyhold messuages, which were surrendered to the use of his will, but no other freehold estate besides that devised to *Henry Everden*.

The question was, Whether the plaintiff is entitled to recover; if not, then a nonsuit to be entered?

Mr. *Buller*, for the lessor of the plaintiff, stated the question to be, Whether by the limitation to the testator's right heirs, any estate passed or not; and he insisted no estate at all passed. That by a devise to the right heirs of a man, no interest whatever passes: That if the testator had stopped at the devise to the daughters, the reversion would have descended to the old uses. 2 *P. Wms.* 135. —3 *Lev.* 406. 2 *Salk.* 590. 10 *Mod.* 369. *Goodright* v. *Wright.* 1 *P. Wms.* 397. *S. C.* That if the testator meant any thing by the expression "*to his right heirs*," he must have meant such person as he should make his heir; namely, *Humphry Davis*: Such a construction would make the whole will consistent, and no doubt he meant to give a freehold to *Davis*. But, secondly, supposing the devises inconsistent, the devise to *Davis*, as being the last, ought to take effect.

Mr. *Davenport*, *contra*, cited *Smith ex dim. Davis* v. *Saunders*, *Hil.* 11 *Geo.* 3. *C. B.* which he said was this very case, upon an ejectment brought there; and the court held the reversion did not pass by the residuary devise. *Vide* this case since reported, 2 *Blackst. Rep.* 736.

Lord *Mansfield* to Mr. *Davenport*. I have looked at that case, in the Common Pleas, and it is in point.

Lord *Mansfield*, after stating the case, proceeded thus: The question is, Whether the devise to *Humphry Davis* includes the reversion of the freehold messuage in *Church-street*, *Edmonton*, and the copyhold in *Barrowfield*?

This question depends upon whether the messuage and copyhold were within the intention of the testator devised by his will to his right heirs. If this case were doubtful, the authority of the court of *Common Pleas* ought to guide us; but there could be no doubt, if the question were *res integra*, that the clear intention of the testator was not to include the reversion of the premises in question, in the devise to his son-in-law *Humphry Davis*. For he first devises them to *Henry Everden* and his wife for their

their joint lives, and to the ſurvivor; then to their eldeſt ſon and his heirs for ever, which would give him the fee; but that deviſe is followed by other words, which by implication ſhew he meant his ſon ſhould only take an eſtate tail, with remainder over to his daughters, and if they died without iſſue, then the eſtate was to go to his own right heirs. The whole reverſion, therefore, is clearly diſpoſed of. 1776. Doe *verſus* Saunders.

It is true, where a man deviſes lands to his right heirs abſolutely, the heir may take by deſcent as being the better title; but where the lands ſo deviſed are ſubject to a charge, he muſt take under the will, that he may not defeat the will. What is the meaning here? The teſtator ſays, he means his heirs ſhall take by deſcent.—After this deviſe, he gives all his freehold and copyhold eſtates to the leſſor of the plaintiff. But he gives them for purpoſes which ſhew he could not mean to include this eſtate: for he directs they ſhall be ſold *immediately* for payment of debts and legacies; and the reſidue of the money ariſing from the ſale to be divided equally amongſt his children. That could not be done in reſpect of the eſtate in queſtion, till he knew whether his ſon *Henry Everden* would have children or not. As to the ſubſequent deviſe of the reſidue, that cannot go further than the firſt: it would be tautology and unintelligible, unleſs applied to the perſonal eſtate. Therefore, both upon the authority of the determination in the *Common Pleas*, and independent of it, I am clearly of opinion that the leſſor of the plaintiff has no title to recover.

Aston Juſtice—I am of the ſame opinion: As to the ſecond deviſe of the reſidue, there is nothing for it to operate upon; for the whole is before deviſed. And if the plaintiff's conſtruction reſpecting the deviſe to the right heirs being nugatory, were to prevail; *Davis* the truſtee muſt immediately ſell the whole eſtate, and *Henry Everden* would be to take only one eighth part of his own eſtate.

Mr. Juſtice *Willes* was of the ſame opinion.

Per Cur. Let a nonſuit be entered.

Full *verſus* Hutchins, Clerk.

Same day.

Prohibition denied after ſentence, where the defendant below had ſet up ſeveral cuſtoms reſpecting tithes, but had ſubmitted to *trial*.

Hutchins libelled *Full* in the eccleſiaſtical court of the Archdeacon of *Totneſs* in *Devonſhire* for tithes. *Full* ſet up a *modus*, and alſo ſeveral cuſtoms, alleging their exiſtence to have been from time immemorial, or at leaſt for 40 years. The

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FULL *verſus* HUTCHINS.

eccleſiaſtical court proceeded to the examination of witneſſes as to theſe ſuppoſed cuſtoms, and pronounced ſentence againſt them. Upon this, *Full* applied for a prohibition, and a rule to ſhew cauſe was granted.

Mr. *Buller* now ſhewed cauſe, and inſiſted, that this being an application for a prohibition *after ſentence*, it ought to appear *upon the face of the libel*, that the eccleſiaſtical court had *no* juriſdiction, otherwiſe a prohibition would not go: But here the objection clearly ariſes upon a *collateral* matter. The party has ſubmitted to trial, and the eccleſiaſtical court have decided as a court of common law would have done. Therefore, the application is now too late. *Buggin* verſus *Bennet*, *Paſch.* 7 *Geo.* 3. *B. R.* ſince reported 4 *Burr.* 2,053.—1 *Bur.* 813.—1 *Str.* 187. *Argyle* verſus *Hunt.* and 1 *Ventr.* 343. in which latter caſe it is ſaid, "it is *diſcretionary* in the court to grant a prohibition."

Mr. *Dunning contra* contended, that the court below had *no* juriſdiction in this caſe; and, therefore, a prohibition might go at any time. For though the eccleſiaſtical court has undoubtedly juriſdiction in matters of tithe, yet in this caſe there was a *modus* ſet up, cuſtoms ſtated and denied, iſſue joined upon them, and a general decree for payment. Now, a cuſtom is a matter peculiarly triable at common law; and from the moment the queſtion of *modus* or no *modus* was ſtarted, there was an end of the juriſdiction of the eccleſiaſtical court. The defence put the cauſe upon a totally different ground, which it is the peculiar province of the common law juriſdiction to judge of. Therefore, a prohibition may go though after ſentence. 6 *Mod.* 252. *Comb.* 254, 448. 1 *Bur.* 314. As to the caſe 1 *Ventr.* 343, in 1 *Sid.* 65. it is expreſsly laid down, "that the granting a prohibition is *not* "*diſcretionary*, but *ex debito juſtitiæ* *."—*Cur. adviſare vult.*

* *Vide* Sir Tho. Raym. 7.

Next day Lord *Mansfield* delivered the opinion of the court as follows:

The caſe is, that the defendant *Hutchins* libelled in the eccleſiaſtical court for tithes. *Full*, the plaintiff, ſet up a *modus*, and ſeveral *cuſtoms*, which he alleged to be *time immemorial*, or at leaſt for *forty* years paſt. Witneſſes were examined, the cauſe was heard, and ſentence given againſt the cuſtoms. *Full* has now made application to this court for a prohibition upon the following ground: that his defence below was a plea of immemorial cuſtoms; that an immemorial cuſtom is a matter properly triable at common law, and, therefore, it appears on the face of the proceedings,

proceedings, that this is a caſe where the ſpiritual court had no jurisdiction. 1776.

FULL *verſus* HUTCHINS.

The queſtion is, Whether this application, being made *after ſentence*, is not too late?

Upon conſideration of the principles on which this doctrine is founded, and upon looking into the caſes, we are all of opinion that the defendant *in this caſe* comes *too late* AFTER SENTENCE.

Where matters, which are triable at common law, ariſe *incidentally* in a cauſe, and the eccleſiaſtical court has juriſdiction in the principal point; this court will not grant a prohibition to *ſtay trial*. For inſtance, if the conſtruction of an act of parliament comes in queſtion, or a releaſe be pleaded, they ſhall not be prohibited, unleſs the court proceed to try contrary to the principles and courſe of the common law: as if they refuſe one witneſs, *&c.* And this is expreſsly laid down by Lord *Hale* in 2 *Lev.* 64. Sir *Wm. Juxom* verſus Lord *Byron*.

There is another denomination of caſes under which the preſent caſe comes, where matters are ſo properly and eſſentially triable at common law, that if the party comes for a prohibition *before* ſentence, this court will grant it *for the ſake of the trial*. But if the party ſubmit to trial, he is afterwards too late.

Where a matter is properly triable at common law, *prohibition* lies *before* ſentence. But if a party ſubmit to trial, it is afterwards too late.

The diſtinction in reſpect of caſes where a prohibition does or does not lie *after ſentence*, is this: If it appears on *the face of the libel*, that the eccleſiaſtical court has *no juriſdiction* of the cauſe, a prohibition ſhall go; becauſe there, *intereſt reipublicæ* that they ſhould not encroach upon the juriſdiction of the temporal courts; and in ſuch caſe, their ſentence is a *nullity*. Therefore, in the caſe of *Paxton* verſus *Knight*, 1 *Burr.* 314. the court, though againſt their inclination, granted a prohibition; becauſe it appeared *on the face of the libel* that the eccleſiaſtical court had *no* juriſdiction.

This doctrine and diſtinction is fully ſettled and eſtabliſhed in a caſe reported in 10 *Mod.* 12. *Baniſter* verſus *Hopton*. There, upon a motion after ſentence for a prohibition to the Spiritual Court, upon a queſtion of preſcription, the court held, that tho' it were a matter triable at common law, yet if the party ſubmit to trial, it will be too late for a prohibition after ſentence. In the margin of that caſe is cited 2 *Salk.* 548. which is cited for the true diſtinction where a prohibition ſhall or ſhall not lie after ſentence: And there it is ſaid, that if it appear in the libel or proceedings of the cauſe, that the cognizance of the cauſe does not belong to the Spiritual Court; a prohibition ſhall go even after ſentence.

Prohibition lies *after ſentence*, if the eccleſiaſtical court has *no cognizance* of the cauſe; otherwiſe if there be only a *defect of trial*.

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FULL *verſus* HUTCHINS.

There is another caſe fully in point to the ſame diſtinction; the name of it is, The churchwardens of *Market Boſworth* verſus the rector of *Market Boſworth*, *Hil.* 10 *Wm.* 3. *B. R.* 1 Lord *Raym.* 435. The libel, in that caſe, was founded upon a *cuſtom* which the defendant denied; and the decree was againſt the cuſtom: a prohibition was moved for, becauſe cuſtom or no cuſtom, is a matter triable at law; and this appearing on the libel, the court had no juriſdiction; therefore prohibition ought to go, though after ſentence. But the whole court held the contrary. And the reaſon given is this; that the plaintiffs, having grounded their libel on a cuſtom, which would have been well grounded if the cuſtom had not been denied, ſhall not, after the cuſtom is found againſt them, prohibit the court from executing their ſentence. For the deſign of the motion for a prohibition is only to excuſe the plaintiffs from coſts. But ſay the court, there is no reaſon why they ſhould not pay them, ſince it appears they have vexed the defendant without cauſe: and therefore denied the prohibition.

The ſame reaſon holds here, as in that caſe. The defendant *himſelf* has alleged the cuſtom, and ſubmitted to trial; therefore, there is no reaſon now why he ſhould have a prohibition to ſave himſelf from the coſts.

We are all of opinion, that the cauſe ſhewn againſt the prohibition ſhould be allowed, and the rule diſcharged.

Per Cur. Rule diſcharged.

Thurſday, May 2d.

Treſpaſs and falſe imprisonment againſt *two*; *one* only found *guilty*: Writ of error in the name of *both*; and *amended*, by ſtriking out the name of the defendant who had judgment below.

VERELST, Eſq. and SMITH, *verſus* RAFAEL.

THE plaintiffs in this caſe were plaintiffs in error, upon a judgment of *C. B.* in an action of treſpaſs and falſe impriſonment brought againſt them in that court *jointly*: but judgment was given againſt *Verelſt* only, *Smith* being found *not guilty*.

Mr. *Bulier* had moved to quaſh the writ of error, becauſe it was brought by them *jointly*: whereas it ſhould have been brought by *Verelſt* only, againſt whom judgment was given.

Mr. *Wallace*, on the part of the plaintiffs, had, on the other hand, moved for leave to amend the writ of error, by ſtriking out the name of *Smith*; upon an affidavit made by the officer, that

that it was *his* miſtake, and that the inſtructions left with him were to make out a writ of error in the name of *Vereſt only*. 1776.

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Both rules now came on together: Mr. *Wallace* and Mr. *Manſfield* for the plaintiffs inſiſted, that this being a miſtake of the *Filazer* was amendable under the ſtat. 5 *Geo.* 1. *c.* 13. and cited *The Sword blade Company* verſus *Dempſey*. 2 *Str.* 892. as in point.

Mr. *Dunning* and Mr. *Buller*, *contra*, contended, that to ſtrike out the name of one of the parties in this writ of error, would be to alter the caſe entirely, and make it in fact a *new* cauſe. That the only object of the motion for amending was, to get rid of the motion to quaſh the writ, which not being agreeable to the original record, was clearly wrong. Beſides, the ſtatute profeſſes to be made to prevent delay; but if this were allowed, it would encreaſe the delay already uſed to keep the defendant out of his right.

Lord MANSFIELD.—The ground upon which the application for quaſhing the writ of error in this caſe is founded, is, becauſe it does not agree with the original record. The reaſon why it does not agree with the record, is owing to a blunder, which the officer ſwears was made by his miſtake. What are the words of the act*? It recites, that great delay of juſtice has been occaſioned by *defective* writs of error, which, as the law ſtood at the time of the act, were not amendable: And then it enacts, "That all writs of error, wherein there ſhall be any *variance* "from the original record, *or other defect*, ſhall be amended." Now here is a *defect*, and that defect owing to the miſtake of the officer. In the caſe that has been cited from 2 *Str.* 892. the name of *Mary Edwards* was added by miſtake: Here, the name of *Richard Smith* is ſo; therefore this caſe is exactly like that. The words of the act are general "*other defects*;" and therefore, if there were any doubt, they ought to be extended as far as poſſible, becauſe it is for the furtherance of juſtice.

*Stat. 5 Geo. 2. c. 13.

Mr. Juſtice *Aſton*, and Mr. Juſtice *Willes* concurred.

Per Cur.—Rule for amending the writ of error, abſolute on payment of coſts; and the rule for quaſhing the writ of error diſcharged.

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Friday, May 3d.

CLAVEY *et al. verſus* HAYLEY *et al.*

A fraudulent judgment and execution, though void againſt creditors, is not in itſelf an act of bankruptcy.

IN trover for a quantity of cloth, upon not guilty pleaded, the jury gave a verdict for the plaintiff, damages 297 *l.* 16 *s.* 10 *d.* and coſts, ſubject to the opinion of the court upon the following caſe.

That a commiſſion of bankruptcy iſſued againſt *William Bloom* on the fourth of *December* 1775.

That the bankrupt being indebted to the defendant *John Cockran* in the ſum of 60 *l.* for ſo much money advanced by him to the ſaid bankrupt; and the ſaid *John Cockran* and the defendant *James Bramble* being *ſecurity* for the ſaid bankrupt by a note of hand for the ſum of 182 *l.* to the plaintiffs *Clavey* and another, and the ſum of 36 *l.* being actually due to the plaintiffs *Clavey* and another, upon a note in which the ſaid defendants *Bramble* and *Cockran* were joined as ſecurity for the ſaid bankrupt; he the ſaid bankrupt on the 18th of *November* 1775, executed a bond and warrant of attorney for confeſſing judgment to the ſaid *Bramble* and *Cockran* in the penal ſum of 558 *l.* conditioned for the payment of 279 *l.*

That judgment was entered up on the ſaid warrant of attorney the 23d of *November* 1775, and execution iſſued the ſame day marked to levy 282 *l.* 16 *s.*

The queſtion was, Whether this tranſaction conſtituted an *act of bankruptcy*; and if the court were of opinion with the plaintiffs, then the verdict to ſtand. But if the court ſhould be of opinion with the defendants, then a nonſuit to be entered.

Mr. *T. Cowper* for the plaintiffs ſtated the queſtion to be, Firſt, Whether the execution taken out in this caſe was not a *fraudulent attachment* within the ſtat. 1 *Jac.* 1. *c.* 15. *ſect.* 2.? Secondly, Whether it was not a *fraudulent conveyance* within another part of the ſame ſection.

Lord MANSFIELD.—A fraudulent conveyance that conſtitutes an act of bankruptcy muſt be by *deed.*

Mr *Cowper* then confined himſelf to the firſt queſtion; and inſiſted, that there being *no debt* due in this caſe to the amount of the ſum for which the judgment was entered up, and the execution taken out, it was clearly a fraudulently procuring his goods to be *attached* within the words of the ſtat. 1 *Jac.* 1. *c.* 15. *ſect.* 2. The words are, "any perſon uſing trade, &c. who wil-

"lingly

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CLAVEY *et al.* *verſus* HAYLEY *et al.*

"ingly or fraudulently hath or ſhall procure himſelf to be ar- "reſted or his goods to be *attached* or *ſequeſtered*." It will be ſaid the word "*attached*" is uſed in a technical ſenſe, and has reference only to certain cuſtoms in the city of *London*, *Briſtol*, and other places. But if ſuch a conſtruction were to prevail, the whole policy of the bankrupt laws would be defeated; and the whole kingdom, except thoſe few places, would be deprived of the benefit of ſuch clauſe. The words clearly mean, any mode by which a legal reſtraint is impoſed on the goods of a trader, by his wilful and fraudulent procurement. There are no authorities on the ſubject, except *Woollen* and others aſſignees v. *Townſhend* and others, before Lord *Mansfield* about three years ago, where Lord *Mansfield* held, that procuring the execution to be brought into the bankrupt's houſe, was, within the meaning of the ſtatute, a fraudulent attachment. Here nothing was due, therefore it was a clear fraud, and conſequently amounts to an act of bankruptcy.

Mr. *Davenport*, *contra*, was ſtopped by Lord *Mansfield*, it being a clear caſe.

Lord MANSFIELD.—As to the point intended to have been argued, Whether this was not ſuch a fraudulent conveyance as conſtituted an act of bankruptcy, it might as well be argued, Whether an eſtate to a man and his heirs is a fee ſimple or not.

As to the other point, the queſtion is, Whether this is ſuch an act, as conſtitutes the *crime* of bankruptcy; not whether it is fraudulent, and may be ſet aſide on that account. I do not remember the particulars of the caſe of *Woollen* v. *Townſhend*; but I think, in that caſe, there was another clear act of bankruptcy. In a ſubſequent caſe of *Harman* and others, aſſignees of *Grey* v. *Spotſwood**, I did at firſt think attachment and ſequeſtration did not include executions. On a ſecond trial, I expreſſed myſelf as if attachment and ſequeſtration did include executions. But I was deſirous to have it ſettled; and afterwards, upon argument, the whole court held it not to be an act of bankruptcy.

* *Hilary* 13 *Geo.* 3. *B. R.*

All the bankrupt acts being *in pari materia*, muſt be taken together. The *ſtat.* 1 *Jac.* 1. *c.* 15. defines the different acts that conſtitute an act of bankruptcy, and amongſt others is the following, "any one who ſhall willingly or fraudulently procure him- "ſelf to be arreſted, or his goods, money, or chattels to be *attach*- "*ed* or *ſequeſtered*." Now the word "*attachment*," being coupled with "arreſts and ſequeſtration," ſhews the legiſlature meant that ſort of *attachment*, by which ſuits are commenced; and that they plainly

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plainly had in view the cuſtoms of *London*, and other towns where that ſpecies of proceſs is made uſe of. A ſequeſtration in *London* is a method of proceeding in an action of debt, where the party cannot be found; in which caſe, upon the action being entered, the officer goes to the warehouſe of the defendant where his goods are, and fixes a padlock on the door; and if the defendant does not put in bail in time, judgment is given againſt him, and his goods are ſold in ſatisfaction. This ſtatute is followed by *ſtat.* 21 *Jac.* 1. *c.* 19. which ſpecifies the different ſecurities of creditors. It firſt enumerates all the common law ſecurities, and then goes on thus: "Or having made *attachments* in *Lon-* "*don*, or any other place by virtue of any *cuſtom* there uſed," and enacts, "that creditors having ſuch ſecurities, unleſs ſerved "and executed, ſhall not come in for more than a rateable part "of their debt, without reſpect to any penalty or greater ſum "contained in ſuch judgment, ſtatute, recognizance, attach- "ment, or other ſecurity."

Therefore we adhere to the opinion given in *Harman* v. *Spotſwood*, that a fraudulent execution, though it will not ſtand in the way of creditors, being void as againſt them, yet does not of itſelf conſtitute an act of bankruptcy.

Aſton and *Willes* Juſtices concurred.

Per Cur. Nonſuit to be entered.

Same day.

WILKINSON *qui tam, verſus* ALLOT.

The *want* of a *parſonage houſe*, is no excuſe for the incumbent's reſiding *out* of the pariſh.

IN debt upon the ſtatute 21 *H.* 8. *c.* 13. for non-reſidence, upon *nil debet* pleaded, a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following caſe.

That the defendant, *Bryan Allot*, clerk, was preſented, inſtituted, and inducted to the rectory of *Burnham St. Mary's*, otherwiſe *Burnham Weſtgate* and *Uiple*, in the county of *Norfolk*, in the year 1766, of the value of above 300 *l. per annum*: That he had firſt a lodging, and afterwards a ready-furniſhed houſe in the ſaid pariſh, until *Michaelmas* now laſt paſt, which he then quitted. That from time immemorial, there *was not*, nor *is there any parſonage houſe* upon the living. That under theſe circumſtances, the defendant *abſented himſelf from all reſidence* on the ſaid living, and *from every parochial duty*, from the 28th day of *April* 1775, to the 28th day of *December* now laſt paſt, (being eight months) *without any other legal excuſe*; and did not, during

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WILKINSON *verſus* ALLOTT.

the ſaid eight months, reſide in or near the ſaid living: but during all that time appointed a proper and *ſufficient curate, or curates*, for all parochial duty of the ſaid defendant's church or churches belonging to the ſaid living, which curate or curates were reſident *upon* the ſaid living.

The queſtion reſerved was, "Whether, under all theſe circumſtances, the ſaid defendant ſhall be deemed guilty of "wilful abſence, and non reſidence, and ſubject to the penalties "of the ſtatute 21 *H.* 8. *c.* 13.?"

Mr. *King* for the plaintiff was beginning to argue, but Lord *Mansfield* called upon the counſel for the defendant to go on.

Mr. *Partridge*, for the defendant, recited the preamble of the *ſtat.* 21 *H.* 8. *c.* 13. and alſo the 26th ſection, from whence he argued, it was apparent that the objects of the ſtatute were of three kinds. 1*ſt*, That the cure ſhould be duly and regularly ſerved. 2*dly*, That hoſpitality ſhould be maintained. 3*dly*, That the parſonage houſe ſhould be upholden and preſerved in a condition fit for the incumbent to live in. That theſe requiſites had been complied with by the defendant, as far as lay in his power. As to the two firſt, it was expreſsly ſtated in the caſe, that there was a ſufficient curate for all the parochial duty, &c. actually *reſident* upon the living. In reſpect of the laſt, it was impoſſible in this caſe for the defendant to comply with it; becauſe, from time immemorial, there never had been any parſonage houſe in the pariſh. It would be abſurd, therefore, to talk of reſidence for the purpoſe of repairs, where there was no houſe to repair. The caſes upon this ſtatute are very few. 6 *Co.* 21. *b. Goodale* v. *Butler. Cro. El.* 590. and *Goldeſbor.* 169. *S. C.* The words in 6 *Co.* are expreſs to the point. "It was agreed, that lawful impriſonment, with"out covin, is a good excuſe for *non-reſidency*; ſo, if *there be not* "*any parſonage houſe there.*" Theſe caſes are excepted out of the act by conſtruction of law. In *Law* verſus *Ibbetſon, Eaſt.* 11 *Geo.* 3. *R. B.* Lord *Mansfield* ſaid, "this caſe is extremely "clear; becauſe the defendant has abſented himſelf from his par"ſonage houſe without any excuſe, and therefore is certainly with"in the meaning of the act. It has been determined that if a parſon "lives in his pariſh, and lets his parſonage houſe, reſerving a cham"ber to himſelf, he is yet ſubject to the penalty*: ſo, if he keeps his "houſe in repair, and ſervants conſtantly live in it†, he himſelf re"ſiding elſewhere; for the reſidence muſt be in the *identical houſe:* "therefore, reſidence in the pariſh, even in a houſe of his own, is "no excuſe. But if there is no parſonage houſe, he is excuſed al"together

* *Cro. El.* 590.

† 2 *Brownl.* 54.

1776. " the ſaid *Humphry Davis*, his heirs, executors, adminiſtrators, " and aſſigns for ever."

DOE *verſus* SAUNDERS. *Henry Everden* and his wife ſurvived the teſtator, and died without ever having had iſſue.

The teſtator had ſix copyhold meſſuages, which were ſurrendered to the uſe of his will, but no other freehold eſtate beſides that deviſed to *Henry Everden*.

The queſtion was, Whether the plaintiff is entitled to recover; if not, then a nonſuit to be entered?

Mr. *Buller*, for the leſſor of the plaintiff, ſtated the queſtion to be, Whether by the limitation to the teſtator's right heirs, any eſtate paſſed or not; and he inſiſted no eſtate at all paſſed. That by a deviſe to the right heirs of a man, no intereſt whatever paſſes: That if the teſtator had ſtopped at the deviſe to the daughters, the reverſion would have deſcended to the old uſes. 2 *P. Wms.* 135. —3 *Lev.* 406. 2 *Salk.* 590. 10 *Mod.* 369. *Goodright* v. *Wright.* 1 *P. Wms.* 397. *S. C.* That if the teſtator meant any thing by the expreſſion "*to his right heirs*," he muſt have meant ſuch perſon as he ſhould make his heir; namely, *Humphry Davis*: Such a conſtruction would make the whole will conſiſtent, and no doubt he meant to give a freehold to *Davis*. But, ſecondly, ſuppoſing the deviſes inconſiſtent, the deviſe to *Davis*, as being the laſt, ought to take effect.

Mr. *Davenport*, *contra*, cited *Smith ex dim. Davis* v. *Saunders*, *Hil.* 11 *Geo.* 3. *C. B.* which he ſaid was this very caſe, upon an ejectment brought there; and the court held the reverſion did not paſs by the reſiduary deviſe. *Vide* this caſe ſince reported, 2 *Blackſt. Rep.* 736.

Lord *Mansfield* to Mr. *Davenport*. I have looked at that caſe, in the Common Pleas, and it is in point.

Lord *Mansfield*, after ſtating the caſe, proceeded thus: The queſtion is, Whether the deviſe to *Humphry Davis* includes the reverſion of the freehold meſſuage in *Church-ſtreet*, *Edmonton*, and the copyhold in *Barrowfield*?

This queſtion depends upon whether the meſſuage and copyhold were within the intention of the teſtator deviſed by his will to his right heirs. If this caſe were doubtful, the authority of the court of *Common Pleas* ought to guide us; but there could be no doubt, if the queſtion were *res integra*, that the clear intention of the teſtator was not to include the reverſion of the premiſes in queſtion, in the deviſe to his ſon-in-law *Humphry Davis*. For he firſt deviſes them to *Henry Everden* and his wife for their

their joint lives, and to the ſurvivor; then to their eldeſt ſon and his heirs for ever, which would give him the fee; but that deviſe is followed by other words, which by implication ſhew he meant his ſon ſhould only take an eſtate tail, with remainder over to his daughters, and if they died without iſſue, then the eſtate was to go to his own right heirs. The whole reverſion, therefore, is clearly diſpoſed of. 1776. DOE *verſus* SAUNDERS.

It is true, where a man deviſes lands to his right heirs abſolutely, the heir may take by deſcent as being the better title; but where the lands ſo deviſed are ſubject to a charge, he muſt take under the will, that he may not defeat the will. What is the meaning here? The teſtator ſays, he means his heirs ſhall take by deſcent.—After this deviſe, he gives all his freehold and copyhold eſtates to the leſſor of the plaintiff. But he gives them for purpoſes which ſhew he could not mean to include this eſtate: for he directs they ſhall be ſold *immediately* for payment of debts and legacies; and the reſidue of the money ariſing from the ſale to be divided equally amongſt his children. That could not be done in reſpect of the eſtate in queſtion, till he knew whether his ſon *Henry Everden* would have children or not. As to the ſubſequent deviſe of the reſidue, that cannot go further than the firſt: it would be tautology and unintelligible, unleſs applied to the perſonal eſtate. Therefore, both upon the authority of the determination in the *Common Pleas*, and independent of it, I am clearly of opinion that the leſſor of the plaintiff has no title to recover.

ASTON Juſtice—I am of the ſame opinion: As to the ſecond deviſe of the reſidue, there is nothing for it to operate upon; for the whole is before deviſed. And if the plaintiff's conſtruction reſpecting the deviſe to the right heirs being nugatory, were to prevail; *Davis* the truſtee muſt immediately ſell the whole eſtate, and *Henry Everden* would be to take only one eighth part of his own eſtate.

Mr. Juſtice *Willes* was of the ſame opinion.

Per Cur. Let a nonſuit be entered.

FULL *verſus* HUTCHINS, Clerk.

Same day.

Prohibition denied after ſentence, where the defendant below had ſet up ſeveral cuſtoms reſpecting tithes, but had ſubmitted to *trial*.

HUTCHINS libelled *Full* in the eccleſiaſtical court of the Archdeacon of *Totneſs* in *Devonſhire* for tithes. *Full* ſet up a *modus*, and alſo ſeveral cuſtoms, alleging their exiſtence to have been from time immemorial, or at leaſt for 40 years. The

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At the trial, I inclined to think, that the settlement being made under a treaty with the *Court* of *Chancery*, and approved of by the Master, was a *bonâ fide* transaction, and that the *possession* of Lord *Montfort* was *not fraudulent*, because it was in *pursuance*, and in *execution*, of the *trust*.

The jury found a verdict for the plaintiff, damages 1 *s.* and if the court should be of opinion with the plaintiffs, then the goods were to be delivered specifically.

Mr. *Wallace* and Mr. *Davenport*, in support of the new trial, insisted that the settlement itself was a fraud, and the possession by Lord *Montfort* the strongest evidence possible of an intention to deceive creditors. That the fact of Lord *Montfort*'s debts being made known to the trustees, was no ground for excepting this case out of the general rule: On the contrary, they ought in that case to have seen that Lord *Montfort* did not meddle with the fortune brought him by Lady *Montfort*; but should have had that sum invested in them for the purpose of discharging the debts due at that time. That this was the common case of a debtor making a beneficial trust for himself.—That Lord *Montfort* might have disposed of the goods during his lifetime; and consequently, as against him at least, they were not protected from an execution at the suit of a fair creditor. They compared this to the case of a trader selling his goods, continuing in possession, and afterwards becoming bankrupt; and cited 3 *Co.* 80. *Twine*'s case.

Mr. *Dunning contra*, did not dispute the doctrine laid down in *Twine's* case, and admitted, that visible possession was a strong circumstance, in all cases, of fraud. But he insisted the possession in this case was not for any purpose of fraud but consistent with and agreeable to the trust. He agreed that Lord *Montfort*'s interest was not protected, but contended the interest of Lady *Montfort* was protected: That the transaction was manifestly *bonâ fide*, and without the most distant intention to defraud, and therefore the plaintiffs were entitled to recover.

Lord MANSFIELD.—The question in this case is, whether the plaintiffs, who are trustees under the marriage settlement of Lord *Montfort*, by which the household goods in question are settled as heir looms with the house in strict settlement, and specifically enumerated in a schedule annexed to the settlement, so as to avoid any fraud by the addition or purchase of new; whether, the trustees are entitled to the possession of these goods against the defendant Mr. *Kennett*.

The defendant has taken the goods in execution; and it is not disputed that he is a fair creditor. But the plaintiffs bring this action

action as truſtees under the marriage ſettlement, and the queſtion is, Whether they are, againſt the defendant, entitled to the poſſeſſion of theſe goods for the purpoſes of the truſt.—I have thought much of this caſe ſince the trial, and in every light in which I have conſidered it, I have not been able to raiſe a doubt. 1776.

CADOGAN *verſus* KENNETT.

The principles and rules of the common law, as now univerſally known and underſtood, are ſo ſtrong againſt fraud in every ſhape, that the common law would have attained every end propoſed by the ſtatutes 13 *El. c.* 5. and 27 *El. c.* 4. The former of theſe ſtatutes relates to *creditors* only; the latter to *purchaſers*. Theſe ſtatutes cannot receive too liberal a conſtruction, or be too much extended in ſuppreſſion of fraud.

The *ſtat.* 13 *El. c.* 5. which relates to frauds againſt creditors, directs "that no act whatever done to defraud a creditor "or creditors ſhall be of any effect againſt ſuch creditor or "creditors." But then ſuch a conſtruction is not to be made in ſupport of creditors as will make third perſons ſufferers. Therefore, the ſtatute does not militate againſt any tranſaction *bonâ fide*, and where there is no imagination of fraud. And ſo is the common law. But if the tranſaction be not *bonâ fide*, the circumſtance of its being done for a *valuable conſideration*, will not *alone* take it out of the ſtatute. I have known ſeveral caſes where perſons have given a fair and *full price* for goods, and where the *poſſeſſion* was *actually changed*; yet being done for the purpoſe of defeating creditors, the tranſaction has been held fraudulent, and therefore void.

One caſe was, where there had been a decree in the *Court* of *Chancery*, and a ſequeſtration. A perſon with knowledge of the decree, bought the houſe and goods belonging to the defendant, and gave a full price for them. The court ſaid, the purchaſe being with a manifeſt view to defeat the creditor, was fraudulent; and therefore, notwithſtanding a valuable conſideration, void.—So, if a man knows of a judgment and execution, and, with a view to defeat it, purchaſes the debtor's goods, it is void: becauſe, the *purpoſe* is *iniquitous*. It is aſſiſting one man to cheat another, which the law will never allow.—There are many things which are conſidered as circumſtances of fraud. The ſtatute ſays not a word about *poſſeſſion*. But the law ſays, if after a ſale of goods, the vendee continue in poſſeſſion, and appear as the *viſible* owner, it is evidence of fraud; becauſe goods paſs by delivery: But it is not ſo in the caſe of a leaſe, for that does not paſs by delivery.

The *ſtat.* 27 *El. c.* 4. does not go to *voluntary* conveyances *merely* as being *voluntary*, but to ſuch as are *fraudulent* *. A fair voluntary conveyance may be good againſt creditors, notwithſtanding

* *Vide infra*, 705. Doe *v.* Routledge.

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ſtanding its being voluntary. The circumſtance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The queſtion, therefore, in every caſe is, Whether the act done is a *bonâ fide* tranſaction, or whether it is a trick and contrivance to defeat creditors. If there be a conveyance to a truſtee for the benefit of the debtor, it is fraudulent. The queſtion then is, Whether this ſettlement is of that ſort. It is a ſettlement which is very common in great families. In *wills* of great eſtates, nothing is ſo frequent as deviſes of part of the *perſonal eſtate* to go as *heir looms* *: For in-

* At the laſt ſittings in *Middleſex* in *Trinity* Term 1779, the following caſe aroſe upon the will of the late Lord *Foley*, and was tried before Lord *Mansfield* at *Weſtminſter*. The name of it was *Foley* and another *againſt Burnell* and another, ſheriffs of *Middleſex*. It was an action of *trover* brought by the plaintiffs, who were truſtees and executors under the late Lord *Foley*'s will, againſt the defendants, to recover a certain quantity of *wine*, *linen*, and *china* taken by the defendants in execution, at the ſuit of a creditor of the preſent Lord *Foley*, the late Lord *Foley*'s eldeſt ſon. Upon not guilty pleaded, the caſe at the trial appeared to be as follows: *Thomas* Lord *Foley* by will dated 19th *June* 1777, and by a codicil dated the 17th of *September* following, deviſed all his real eſtates in ſeveral counties to the plaintiffs for a term of 99 years, and ſubject thereto, to his eldeſt ſon *Thomas Foley* for life, with remainder to his firſt and other ſons in ſtrict ſettlement. Remainder to his ſecond ſon *Edward Foley* for life, with remainder to his firſt and other ſons in ſtrict ſettlement. Remainder to *Andrew Foley* one of the plaintiffs, with remainder to his firſt and other ſons in like manner; with remainders over. The truſts of the term were to receive the rents and profits, and thereout, according to their will and pleaſure, to allow the two ſons *Thomas* and *Edward*, yearly and every year, any ſum or ſums of money not exceeding in the whole the ſum of 6000*l.* in any one year, till ſuch time as the debts of his ſaid two ſons ſhould be diſcharged; but ſo as his ſaid two ſons ſhould have *no eſtate* or *intereſt* in the rents and profits of the ſaid premiſes. And then the teſtator, after providing for the diſcharge of his ſaid ſons' debts, deviſed as follows: "Alſo I give and bequeath all the ſtandards, fixtures, *houſhold goods*, implements, and "*houſhold furniture*, pictures, tapeſtry, gold and ſilver plate, *china*, porcelaine, glaſs, "ſtatues, buſts, libraries and books, which ſhall be in the ſaid ſeveral capital meſ- "ſuages, called *Stoke*, *Great Witley*, and *Foley* Houſe to be held and enjoyed by the "ſeveral perſons who from time to time ſhall ſucceſſively and reſpectively be entitled "to the uſe and poſſeſſion of the ſame houſes reſpectively, as and in the nature of "*heir looms*, to be annexed to, and go along with, ſuch houſes reſpectively for ever."

At the death of the teſtator there was a conſiderable quantity of *wine*, *linen*, and *china* in *Foley* Houſe.

The truſtees under the will of Lord *Foley*, permitted his eldeſt ſon Lord *Foley* and his family to live in *Foley* Houſe rent free; ſent him the key of the *wine*, and Lady *Foley* the key of the *linen* and *china*: which they accordingly uſed as they liked, and continued in poſſeſſion of, till they were taken in execution by the defendants in this action. Upon the execution's coming into the houſe, the plaintiffs gave notice to the ſheriff that part of the *wine*, *linen*, and *china*, ſpecifying the particulars of each, belonged to them as the truſtees and executors under the late Lord *Foley*'s will, and demanded them to be delivered up; which was refuſed.

The jury at the trial found a verdict for the plaintiffs, to the amount of the wine, linen, and china, taken in execution; and the defendants acquieſced without moving for a new trial.

ſtance,

ſtance, the deviſe of the Duke of *Bridgewater*'s library.—The old Duke of *Newcaſtle*'s plate. So in marriage ſettlements, it is very common for libraries and plate to be thus ſettled, and for chattels and leaſes to go along with the land. If the huſband grows extravagant, there never was an idea that theſe could afterwards be overturned. If this court were to determine they ſhould, the parties would reſort to Chancery.—We come then to the circumſtances of the preſent caſe, which are very ſtrong. There is not a ſuggeſtion of any intention to defraud, or the moſt diſtant view of diſappointing any creditor. The very objection of the marriage ſettlement was, that the lady's fortune might be applied to the diſcharge of all Lord *Montfort*'s debts: the amount of this fortune was 10,000 *l.* and was thought fully ſufficient for that purpoſe. Beſides this, it is a ſettlement approved by a Maſter in Chancery. Moſt clearly the Maſter in Chancery and the Great Seal could have no fraudulent view. But it appears further, that the reaſon why the goods were inſerted was, becauſe the ſettlement of the real eſtate alone was thought inadequate without them. Clearly, therefore, it was no contrivance to defeat creditors, but meant as a proviſion for the lady if ſhe ſurvived, and heir looms for the eldeſt ſon. 1776.

CADOGAN *verſus* KINNETT.

An argument, however, is drawn from the *poſſeſſion*, as a ſtrong circumſtance of fraud: but it does not hold in this caſe. It is a *part* of the *truſt* that the goods ſhall continue in the houſe; and for a very obvious reaſon: becauſe, the furniture of one houſe will not ſuit another; and it was the buſineſs of the truſtees to ſee the goods were not removed.

If Lord *Montfort* had let his houſe with the furniture, reſerving one rent for the houſe, and another for the furniture; or if the rent could be apportioned, the creditors would be entitled to the rent; but they have no right to take the goods themſelves: The poſſeſſion of them belongs to the truſtees, and the abſolute property of them is now veſted in the eldeſt ſon.

I expected an authority; but though ſuch ſettlements are frequent, no caſe has been cited to ſhew they are fraudulent. How common are ſettlements of chattels, and money in the ſtocks: can there be a doubt but they are good? Yet the creditors would be entitled to the dividends during the intereſt of the debtor. Here, there was clearly no intention to defraud, and there is a good conſideration. Therefore, I am of opinion it could not be left to the jury to find the ſettlement fraudulent, merely becauſe

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CADOGAN *verſus* KENNETT.

there were creditors. The goods muſt now be kept in the houſe for the benefit of the ſon.

ASTON Juſtice. I am of the ſame opinion.

WILLES Juſtice.—I am of the ſame opinion.

Per Cur. Rule for a new trial diſcharged.

Lord MANSFIELD.—The goods and furniture that have not been ſold are to be delivered ſpecifically. As to thoſe which have been ſold, let any indifferent perſon put a value upon them; the value to be paid by Mr. *Kennett*, and the amount veſted in government ſecurities at 3 *l. per cent.* upon the truſts of the ſettlement; the intereſt to be paid to Alderman *Kennett* during Lord *Montfort*'s life. And as to all the goods which are not included in the ſchedule, they belong to the defendant under the execution.

N. B. This was conſented to at *Niſi Prius*, in caſe the court ſhould be with the plaintiffs upon the general queſtion.

Friday, May 17th.

MARTYN *verſus* HIND.

If a rector give *A. B.* a title to the biſhop and thereby appoint him curate of his church, promiſing to allow him a ſalary and to continue him in the office of curate, *till otherwiſe provided of ſome eccleſiaſtical preferment*, unleſs lawfully removed for any fault, he cannot afterwards remove him without cauſe: and if the ſalary be in arrear, *A. B.* may maintain *aſſumpſit* upon the title.—*A readerſhip* is not an *eccleſiaſtical preferment* within the meaning of ſuch title.

UPON ſhewing cauſe why a new trial ſhould not be granted, the caſe as it appeared by the report was to this effect. The action was an action brought by the plaintiff againſt the defendant, who was the rector of St. *Ann's Weſtminſter*, to recover a ſum of money due from him to the plaintiff, for officiating as his curate. The declaration conſiſted of ſeveral counts. The third count, on which the verdict was taken, ſtated as follows: "And whereas alſo the ſaid *Richard* at the time of the making the "promiſe and undertaking hereinafter next mentioned, was, and "from thence always hitherto hath been, and ſtill is, rector of the "ſaid pariſh church of St. *Ann Weſtminſter* in the ſaid county, to "wit, at *Weſtminſter* in the ſaid county, and the ſaid *Richard* be"ing ſuch rector as aforeſaid, by a certain inſtrument in writing, "ſubſcribed by and with the proper hand of the ſaid *Richard*, "bearing date the 13th of *February* 1769, at *Weſtminſter* afore"ſaid, he the ſaid *Richard* undertook, and to the ſaid *Thomas* then "and there faithfully *promiſed* to *retain*, and *continue* the ſaid *Tho*"*mas* to *officiate in the ſaid church, until he ſhould be otherwiſe pro*"*vided with ſome eccleſiaſtical preferment*, unleſs, by *fault* by him "committed, he the ſaid *Thomas* ſhould be *lawfully removed* from "the ſame; and to pay him the ſum of fifty guineas a year dur"ing that time. And the ſaid *Thomas* in fact ſays, that although "he is not yet provided with any other eccleſiaſtical preferment, "nor has been lawfully removed from the ſame church, or

"officiating

" officiating therein, yet the ſaid *Richard*, not regarding, &c.— Plea *non aſſumpſit*. Verdict for the plaintiff. At the trial, the plaintiff, in order to prove the defendant's undertaking, gave in evidence the following certificate directed to the biſhop of *London* on the plaintiff's being ordained prieſt. 1776. MARTYN verſus HIND.

" Theſe are to certify to your Lordſhip, that I, *Richard Hind*, " rector of St. *Ann's Weſtminſter*, in the county of *Middleſex*, " and your Lordſhip's dioceſe of *London*, do hereby nominate " and appoint the Reverend *Thomas Martyn*, to perform the of- " fice of curate in my church of St. *Ann* aforeſaid; and do pro- " miſe to allow him a yearly ſum of fifty guineas for his main- " tenance in the ſame, and to continue him to officiate in my ſaid " church, *until he ſhall be otherwiſe provided of ſome eccleſiaſtical* " *preferment*; unleſs, by any fault by him committed, he ſhall " be lawfully removed from the ſame. And I hereby ſolemnly " declare, that I do *not fraudulently* give this certificate to *entitle* " the ſaid *Thomas Martyn to receive holy orders*, but with a real " intention to employ him in my ſaid church according to what " is before expreſſed. Witneſs my hand this 13th day of *Febru-* " *ary* 1769. *R. Hind.*"

On the part of the defendant, two ſeveral notices were produced from him to the plaintiff; one, dated 26th of *November* 1774; the other, dated *June* 16th 1775, directing him to quit the curacy: The laſt of which was in theſe words. " Dr. *Hind* here- " by gives notice to Mr. *Martyn* to quit the curacy of this pa- " riſh on the 26th of next month, agreeably to a former notice " given to him on the 26th of laſt *November*." They alſo produced an appointment of the plaintiff to the readerſhip of the pariſh in *June* 1769, of the value of 30 *l. per annum*. In reſpect of this office, it appeared, by the entries in the pariſh books, that from the year 1718, a reader was ſupported by the will of a Mr. *Biſhop* out of the profits of ſome leaſehold premiſes, until the year 1734: from which time the reader was ſupported by order of the *veſtry*, and *at their will*, out of monies allowed the churchwardens in their accounts. That the reader was appointed by the veſtry; but no traces could be found of any appointment prior to the year 1718. That the duty of the plaintiff, as reader, was to read prayers on ſuch days as the parſon of the pariſh was not uſed to perform divine ſervice.

Mr. *Dunning* and Mr. *Buller*, who ſhewed cauſe, inſiſted, that a *readerſhip* was *no eccleſiaſtical preferment*. That, according to Dr. *Burn* in his third volume of eccleſiaſtical law, the office began in the third century; and was one of the five inferior orders

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in the *Romiſh* church. That in the *Greek* church, they were appointed by ordination: But in the *Latin* church, ordination was not neceſſary. That in *Wales*, in many parts of *England*, and in colleges, perſons officiate as readers who are not even in orders. That in this pariſh there was no reader till 1718; and though at that time a fund was appointed ſufficient to ſupport it during a certain period, it was now an office determinable at the will of the pariſhioners; and therefore, could not in any light be conſidered as preferment within the meaning of the title. If ſo, the *remaining objection* was, that the title itſelf was only an engagement to indemnify the biſhop, and no promiſe or undertaking to provide for the plaintiff. As to that, they inſiſted, that by the terms of the inſtrument it was clearly a certificate of the plaintiff's appointment to the office of curate in the defendant's church; a promiſe to allow him fifty guineas *per annum*; and an expreſs undertaking to continue him in the office till otherwiſe provided for. Added to which, it contained a ſolemn declaration that the defendant did not mean it as a mere title to the plaintiff to enable him to obtain prieſt's orders; but to give him a *permanent* intereſt, determinable only in two events, neither of which had taken place; namely, his being provided with ſome eccleſiaſtical preferment, or being lawfully removed for ſome fault.—That if it was *not* meant as a *title*, it could be no indemnity to the biſhop; and therefore, there was no ground for ſuch objection.—To ſhew the conſideration was a good and ſufficient ground for the promiſe alleged, they relied on *Dutton* verſus *Poole*, 1 *Ventr.* 318. 332.

Mr. *Wallace*, Mr. *Manſfield*, and Mr. *Davenport*, *contra*, for the defendant, contended: 1ſt. That this certificate was *no promiſe* or undertaking on the part of the defendant, to employ the plaintiff as his curate; but intended merely as an *indemnity* to the biſhop againſt the proviſions of the 33d canon: by which, every biſhop, who ordains a parſon without a title, is obliged to maintain ſuch perſon at his own expence. That this was the object of both parties at the time, was apparent from the certificate being ſent to the biſhop, kept in his cuſtody, and produced at the trial by his ſecretary. By the terms of it, the contract was with the *biſhop* only; and if *he* had brought an action, ſuggeſting a damage ſuſtained by the plaintiff's being without preferment, the action would have lain. Beſides, in all contracts, the obligation ought to be *reciprocal*. But here the plaintiff might have quitted the curacy at his pleaſure. 2dly, They objected that the plaintiff had no *licence* from the biſhop to officiate as curate; and ſuppoſing he had, ſtill he was removable at pleaſure: Therefore,

could not maintain this action. To this point, were cited, 2 *Salk*, 566. *Bunbury* 273. 2 *Vez.* 427. *Noy.* 15. *Bott* v. Sir *Edward Brabalon*. 3dly. That the appointment of the plaintiff to the readership of St. *Ann's*, at the salary of 30 *l. per annum*, was an ecclesiastical preferment. That the duty of the reader in such a case was not such as a layman could perform, but required the whole of the divine service to be read, and that he should assist in the administration of the sacrament: And cited 3 *Burn. Ec. Law.* tit. *Ordination*, p. 24. 1776. MARTYN versus HIND.

Lord *Mansfield* upon the argument said; this is a general question, and quite new. It does not turn upon a distinction between *perpetual* curates and general or temporary curates. There is a distinction between curates licensed, and curates not licensed. If not licensed, they are removable at pleasure. But if licensed, they are only removable *sub modo*; for instance, by the consent of the bishop; or where the rector does the duty himself. But the great point in this case is, what is the import of the obligation which a person comes under, by giving such a title to the bishop: Whether it is a *jus quæsitum* in the curate, so as he can oblige the parson to make good the salary to him, according to the terms of the certificate. As to the plaintiff's not having a license in this case, it is true the bishop has not licensed him *in form*, but he has *substantially* and in effect licensed him, by receiving his title. It is a matter of importance; and, therefore, we will think of it.

Cur. advisare vult.

Afterwards, on this day, Lord *Mansfield* delivered the opinion of the court as follows:

This is an action brought by the plaintiff, as curate of the defendant, who is rector of the parish of St. *Ann's Westminster*, to recover a sum of money due to him for his salary or stipend. His Lordship stated the third count upon which the verdict was taken;—the title for the plaintiff's having priest's orders, and the two notices to quit *: and then proceeded thus:

Vide supra, 438.

It has been argued, that this was a reasonable notice to the plaintiff, supposing Dr. *Hind* could remove him at his pleasure. The defendant employed another curate. It was admitted that the plaintiff was always ready to perform the duty of curate; and the defendant engaged to admit this, to avoid any contest between him and the new curate.

At the trial, a defence was attempted, *viz*; that the plaintiff was lawfully removed for faults by him committed, and imputations were thrown upon his life and manners: and evidence of-

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fered to prove the irregularity of his conduct; but I would not ſuffer them to go into any criminal charge againſt the plaintiff: Becauſe I thought, in the firſt place, that the defendant ought in that caſe to have complained to the biſhop, and obtained his ſentence, or judgment, or direction in a *formal*, or at leaſt in a *ſummary* way: And ſecondly, if the defendant could, without applying to the biſhop, have removed the plaintiff for a cauſe, ſubject to the opinion of this or any other court, as to the ſufficiency of ſuch cauſe of removal; he ought to have given the plaintiff notice of it. But in the notices given to the plaintiff to quit, he ſpecifies no fault or objection, but grounds them on his mere will and pleaſure. It did not appear by the evidence, that he had ever hinted to the plaintiff, what was now by *ſurpriſe* offered to be laid to his charge; ſo that he could not poſſibly be prepared to make any anſwer to the charge.—This objection of mine to the entering into proof of ſuch a charge, has not been complained of, nor mentioned by counſel; nor has any motion been made for a new trial, in order to let the defendant into that evidence. But I think fit to take notice of it, becauſe I have heard of it; and wiſh the grounds upon which this cauſe is determined may not be miſapprehended. Upon full conſideration we are of opinion, that it was right not to ſuffer the defendant, under theſe circumſtances, to juſtify the removal of the plaintiff, by an accuſation produced for the firſt time at the trial of the cauſe. And, therefore, I deſire it may be underſtood, that whatever the deciſion of the preſent cauſe may be, we do not proceed upon any ground that ſuch a curate as this may not be removed by the biſhop; or even that if a miſbehaviour is preciſely notified to him, as the cauſe of his removal, the rector may not juſtify himſelf by that cauſe, if it be true in fact and ſufficient in law. That ground is ſtill open and may be inſiſted upon in caſe of another action.

After over-ruling this attempt, the cauſe being general, and new in *Weſtminſter* Hall, I deſired to ſave it for the opinion of this court; and the jury gave a verdict for the plaintiff, ſubject to that opinion.

Three objections are made to the plaintiff's recovering in this action. Firſt that the *promiſe* is a promiſe to, and a *contract* or engagement with, the *biſhop*, to *indemnify* him from maintaining the plaintiff; but is *no promiſe*, no contract, no engagement with the *plaintiff*, and, therefore, gives him no right to ſue.—The *ſecond* objection is, that the plaintiff is not *licenſed* by the biſhop.—The *third* objection is, that the plaintiff, on the

the 26th of *June* 1769, was appointed *reader* of *extra* prayers in this parish church, at the hours of 11 and 4 o'clock, at a salary of 30*l.* a year, to be paid by the churchwardens, and charged in their accounts. This, the defendant says, is an *ecclesiastical preferment*, and consequently, that the defendant, from that day, was not obliged to continue the plaintiff as his curate. 1776. MARTYN *versus* HIND.

As to the first, Whether the plaintiff can maintain any action, it will be necessary to examine and consider the *nature* of the *title*, and the nature of the *certificate* to the bishop. In the canons of 1603, by the 33d canon, there is this provision— "It has been long since provided by many decrees of the ancient "fathers, that none shall be admitted either deacon or priest, "who had not first some place to exercise his function in: "According to which examples we do ordain, that henceforth "no person shall be admitted into sacred orders, except he shall "at that time exhibit to the bishop, of whom he desireth impo- "sition of hands, a presentation of himself to some *ecclesiastical* "*preferment*, then void *in that diocese*: Or shall bring to the "said bishop a true and undoubted *certificate*, that either he is "*provided of some church within the said diocese*, where he may "attend the cure of souls; or of some minister's place vacant in "the cathedral church of that diocese, or in some other collegiate "church therein also situate, where he may execute his ministry "*&c.* And if any bishop shall admit any person into the mi- "nistry that hath none of these titles, as is aforesaid, then he "shall keep and maintain him with all things necessary, till he "do prefer him to some ecclesiastical living."

This shews, that, by the general canon law, it is not barely necessary, that a man, to be ordained, should have a maintenance; but that he should likewise have, *within the diocese*, some church where he may exercise his ministerial function: For *that* is the ground upon which the bishop is entitled to ordain; and if the cure is in another diocese, the bishop offends by ordaining him without special letters dimissory for that purpose. *Vide Gibson*'s Commentary upon this title, page 162-3.

It must therefore be a *church*, or place *within the diocese*, where he may exercise his function; and this provision I take to be older than the penalty upon the bishop; for that began in the year 1200.

What then is the bishop to be informed of before he ordains? That the person to be ordained has, *in the diocese*, some *benefice*,

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church, or *curacy*, as in the canon abovementioned. When the biſhop is certified of this, he is liable to no penalty; and if, after ſuch certificate, the clergyman, who is ordained, quit the curacy, or be unjuſtly removed, the biſhop is not in fault. He is only liable, in caſe he ordains *without* ſuch certificate.

In the next place, what is the operation of the certificate? It is not a contract with the biſhop to indemnify him; but a certificate and aſſurance to the biſhop of a matter of fact: That ſuch a one has appointed the perſon named in the certificate, to be curate of his pariſh; that he undertakes to pay him a certain ſalary, and that he will continue him in the curacy till he is otherwiſe provided. It is difficult to raiſe a queſtion, when the mere ſtate of the certificate itſelf makes the caſe plainer than any argument can do. It is no indemnity to the biſhop, or any thing like it. It is no promiſe to, or contract with him, but merely an information of a matter of fact.

As to the caſe of *Dutton* verſus *Poole*, 1 *Vent.* 318. 332. it is matter of ſurpriſe, how a doubt could have ariſen in that caſe. It was a promiſe to the father by a perſon in remainder, that if he would leave ſo much wood ſtanding, he would pay his daughter 1000*l.* the value of the wood which the father had intended to cut down. The daughter, upon the father's death, brought an action for the 1000*l.* and the court held ſhe was entitled to bring the action. And upon error, the judgment was affirmed. But this caſe is infinitely ſtronger; for it is in no poſſible reſpect a promiſe, but merely a matter of information to the biſhop: The contract is with the curate. Therefore, there is no ſhadow of objection to the plaintiff's maintaining this action.

The 2d objection is, that the plaintiff is *not licenſed* by the biſhop. Within the true intent and meaning of the canon law, he *is* licenſed by the biſhop; for he has ordained him on *this title*. If ſo, the biſhop has ſolemnly approved of his being the curate of this church. It is the very foundation and title of the ordination; and therefore he is licenſed to all intents and purpoſes. Whether this be a compliance with the letter of ſome penal ſtatutes which require a ſpecific form of licence, may be a critical queſtion. But the objection does not lie in the mouth of the defendant, as an excuſe to him for not performing his contract: He, as well as the plaintiff, have underſtood for years, that is, ever ſince the year 1769, that his ordination upon this title was a ſufficient licence; or if they did not ſo underſtand it, the defendant

fendant has waved the objection. In his notice to quit, he does not object the want of a licence: In case he had, the plaintiff might have immediately got a licence, had he thought that necessary. If, after reasonable notice, he does not procure every qualification necessary to enable him to do the duty, the defendant would be excused from paying him the salary; for the plaintiff's service as curate, is not only the *consideration*, but the *condition* of the salary. 1776. MARTYN *versus* HINN.

The 3d objection is, that the plaintiff is in fact, and agreeably to the terms of the contract, otherwise provided with an ecclesiastical preferment.

Of this objection we have thought a great deal. The action does not appear in a very favourable light. But independent of that, the success of the plaintiff in this case may involve both parties in more litigation, little to the advantage of either. Besides this, one would wish to avoid animosities in parishes, which such disputes too frequently create. But, upon the fullest consideration, we find it impossible to say, that *this readership* is an *ecclesiastical preferment*. For, what is the office of the plaintiff, when the terms of it come to be understood?

The term *reader*, has confounded us; but it has nothing to do with the cause. The plaintiff is not a reader in any sense of the law. This is nothing more than a parish employing a clergyman in priest's orders to read prayers, and they call him a reader.

The term *reader*, is made use of by the canon law; but a reader known to the canon law is always put in *opposition* to a *clergyman*. It is one of the five orders of the *Romish* church inferior to the deacon; they are always considered *laymen* in the idea of the canon law, and are expressly put in opposition to clergymen. I have been informed, that in the *Welch* dioceses, where there is no endowment worth the while of a clergyman to accept (and in *Chester* there are many such) many persons officiate as readers in opposition to clergymen. At the reformation there were several objections started with respect to readers; every one of which consider them not as clergymen. Is an employment then, an ecclesiastical preferment, where a private man may be employed? *Watson* upon the canon law states, that there are but two ways of being provided by the church, without being an incumbent of it; *viz.* "being a curate, or a lecturer." They are both taken notice of by law. They must be licensed; they must subscribe to the articles, and make the declaration. But a priest employed by

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by any body to read prayers, wants no authority: The very ordination gives him the authority: He wants no licence, he ſigns no articles: The biſhop cannot inhibit him, and the office is temporal.

I deſired the inſtitution of the pariſh might be looked into: It is probable there were miniſters employed to read prayers in this pariſh before the year 1706; becauſe it was in proof, that a Mr. *Brown* left a legacy on a temporary fund to be divided between the reader and the lecturer. But there is no entry of this till 1718; and it varied in reſpect of the duty to be done: For in ſome caſes the reader was required to aſſiſt the clerk. But in the appointment of the plaintiff nothing is required except as before ſtated. In 1734, the temporary fund ceaſed; then there is an entry, that information has been given of its ſo ceaſing; upon which the pariſh make an order, that 30*l*, *per annum* ſhould be paid to the reader out of what they call the *commiſſion* money. Afterwards a ſubſequent order is made, that the church-wardens were to pay it. What ſtability is there in this? No one can read prayers in a church without the conſent of the rector. What obligation is there, if the pariſh ſhould think fit not to have a reader, to bind or compel them to have one any longer? The appointment and ſalary are only during pleaſure; and the office ſuch as requires no licenſe or authority. Therefore, we think it impoſſible to conſider this as an eccleſiaſtical preferment. The conſequence is, that the rule for a new trial muſt be diſcharged.

Per Cur. Rule diſcharged.

Same day.

FOX *et al.* Aſſignees *verſus* HANBURY *et al.*

If one of two partners become bankrupt, the ſolvent partner may, if for a valuable conſideration and *without fraud*, diſpoſe of the *partnerſhip* effects; and if *he* afterwards fail, the aſſignees, under a *joint* commiſſion againſt *both*, cannot maintain *trover* againſt the *bonâ fide* vendee of ſuch partnerſhip effects.

UPON a rule to ſhew cauſe why the arbitrator named in an order of *niſi prius*, made in this caſe, ſhould not be directed to ſettle, in his award, the account of the conſignments of tobacco to the defendants, proved on the trial, from the time of the bankruptcy of *Thomas How Ridgate*; the caſe, as reported and ſtated by Lord *Mansfield*, appeared to be as follows:

This was an action of trover brought by the plaintiffs, as aſſignees under a joint commiſſion of bankrupt, taken out againſt *John Barnes* and *Thomas How Ridgate* bankrupts, to recover 4,000 hogſheads of tobacco. The declaration conſiſted of *two* counts; one charging the trover and converſion to be, *before either* of the bankrupts had committed an act of bankruptcy; the other charging it, *ſubſequent* to an act of bankruptcy committed by *both* the bankrupts.

Barnes,

Barnes and *Ridgate* were partners; *Ridgate* lived in *England*, and *Barnes* lived in *Maryland*. 1776.

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verſus
Hanbury.

Ridgate was under very large acceptances, and much preſſed for money. To ſupport his credit, *Hanbury* agreed to pay, and actually did pay, ſeveral bills for him. But with a view to better carrying on the buſineſs, *Ridgate* was to go to *Maryland*, and *Barnes* was to come to *England*. *Hanbury* interpoſed his credit, upon the confidence of conſignments of tobacco being made to him, which would be a pledge for the monies he advanced.

Ridgate told his clerk that he was going to *Maryland*, and that *Barnes* would come over to *England*; but bid him ſay, the day he ſet out, that he was gone to *Hanbury*'s country houſe, and would return ſoon. *Mauduit*, a creditor, called, and had that anſwer. *Ridgate* went to *Maryland*, and *Barnes* came to *England*.—No umbrage was taken by the creditors at this exchange of the reſidence of the two partners: Neither *Ridgate*, *Barnes*, or *Hanbury* had an idea that this exchange of reſidence was an act of bankruptcy. There was no intention to commit an act of bankruptcy.

Conſignments of tobacco were made by *Barnes* to *Hanbury* before *Barnes* left *Maryland*, and there were other conſignments afterwards. Upon the 22d of *January* 1773, *Barnes*, after returning to *England*, committed an act of bankruptcy, and afterwards publicly failed. Then, and not before, the creditors ſet up *Ridgate*'s going to *Maryland* as an act of bankruptcy by him, and they took out a joint commiſſion againſt both; and the plaintiffs, in the capacity of aſſignees under the commiſſion, brought the preſent action.

Whether *Ridgate*'s going to *Maryland*, under the particular circumſtances beforementioned, ſhould be conſtrued an act of bankruptcy, was a queſtion much litigated at the trial. The jury, upon the miſrepreſentation to *Mauduit* beforementioned, were of opinion it was; and accordingly found him a bankrupt upon the 15th of *July* 1772, the day on which he left *London*. No *fraud* or want of conſideration was fixed upon *Hanbury*. But the plaintiffs inſiſted, that all the conſignments *after* the 15th of *July* 1772, were *void*. The defendants inſiſted, that all the conſignments *before* the 22d of *January* 1773, were *good*. There were conſignments after the 22d of *January* 1773, which the defendants could not ſupport; and therefore, as to them, an account was neceſſarily to be taken of the value of the tobacco, which ſo came to the hands of the defendants, after making juſt allowances.

That

1776. That account was referred to an arbitrator; and the queſtion, whether the plaintiffs were entitled in this action, to recover the *whole* of the value of the conſignments made by *Barnes* between the 15th of *July* 1772, and the 22d of *January* 1773, or a *moiety* thereof, was ſubmitted to the opinion of the court: And according to ſuch opinion, ſuch conſignments are to ſtand or fall, and to be brought into, or left out of the account, by the arbitrator.

Fox *ve-ſus* HANBURY.

This caſe was argued twice, firſt in *Hilary* term laſt by Mr. *Wallace* and Mr. *Buller* for the plaintiffs, and Mr. *Mansfield* and Mr. *Dunning* for the defendants. The court then ordered it to be argued by one counſel on each ſide this term. It was accordingly argued by Mr. *Buller* for the plaintiff, and Mr. *Mansfield* for the defendant.

Mr. *Buller* for the plaintiffs inſiſted, *1ſt*, That the conſignments were fraudulent, being with a view to give the defendants a preference, and therefore void for the whole. *2dly*, If not void for the whole, the plaintiffs were at leaſt entitled to a *moiety*: For by the bankruptcy of *Ridgate*, the partnerſhip was immediately diſſolved; and ſo it was held by Lord *Mansfield* and *Yates* Juſtice, in the caſe of *Hague* and others, aſſignees of *Scot* againſt *Rolleſton*, 4 *Bur.* 2174. If ſo, *Barnes*, the ſolvent partner, had no longer a power over the whole, but each had his own moiety only to give or grant. If an execution iſſued againſt one of two partners, the ſheriff, though he may ſeize the whole, can only ſell an undivided moiety. *Heydon* verſus *Heydon*, 1 *Salk.* 392. By the ſame rule, a bankruptcy ſevers from the time; for a bankruptcy is an execution in the firſt inſtance. From the moment, therefore, that *Ridgate* failed, the power of *Barnes* to bind the whole of the partnerſhip effects ceaſed; conſequently, the plaintiffs were entitled to a moiety.

Mr. *Mansfield* for the defendant, *contra*, contended that the plaintiffs could not recover on either count. For if the goods were the property of both the partners, as alleged in the firſt count, each had a right to diſpoſe of the whole; and the conſignment by one partner was the conſignment of both. That here there was not even a ſuggeſtion of fraud; and conſequently no ground of action to entitle them to recover upon that count. As to the 2*d* count, he argued that the bankruptcy of one partner was not to all purpoſes a diſſolution of the partnerſhip. But ſuppoſing it were, and that the aſſignees became entitled to an undivided moiety, they ſhould in that caſe have declared as the aſſignees of *Ridgate* only; not as the joint aſſignees of both the partners.

ners. But even in that ſhape, the action could not have been maintained; for then the aſſignees and the ſolvent partner would have been *tenants in common*: and *trover* or detinue does not lie by one tenant in common of chattels perſonal againſt another. *Litt. Sect.* 323. Therefore the plaintiffs had no title to recover. 1776. Fox *verſus* Hanbury.

Lord MANSFIELD.—The ſingle queſtion is, Whether the act of the ſolvent trader for a valuable conſideration, is good, after an act of bankruptcy committed by his partner, without his knowledge, and without the leaſt colour or mixture of fraud. Whether the aſſignees can, in ſuch a caſe, come againſt the *bonâ fide* conſignee of the ſolvent partner, to recover the value of the goods conſigned. The aſſignees ſtand in the place of the bankrupt, and can in no caſe be in a better ſituation than the bankrupt himſelf would have been in, under the ſame circumſtances. Suppoſe in this caſe, the partnerſhip had been diſſolved, and the tobacco had been in the poſſeſſion of *Barnes*: What action could *Ridgate* have had againſt theſe goods ſpecifically? Would he have been entitled to any thing but the balance of the account?

Cur. adviſare vult.

Afterwards, on this day, Lord *Mansfield*, having ſtated the caſe (*ut antea*) delivered the opinion of the court as follows:

The queſtion for the opinion of the court is a general one; Whether aſſignees, under a joint commiſſion againſt two partners, taken out after the bankruptcy of both, can maintain an action of *trover* againſt a perſon in poſſeſſion of goods under a ſale or conſignment *bonâ fide*, for a valuable conſideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himſelf, but after an act of bankruptcy committed by the other partner.

An act of bankruptcy by one partner, is to many purpoſes a diſſolution of the partnerſhip, by virtue of the relation in the ſtatutes, which avoid all the acts of a bankrupt from the day of his bankruptcy; and from the neceſſity of the thing, all his property being veſted in the aſſignees, who cannot carry on a trade.

In the caſe of *Hague* verſus *Scott*, *Hil.* 8 *Geo.* 3. *B. R.* cited by Mr. *Wallace* and Mr. *Buller*, it was held, that the ſtatutes concerning bankrupts made an *entire*, *not a partial avoidance* of the *bankrupt*'s acts, as well in reſpect of his partner's moiety, as his own. But no caſe has been cited, where a ſecret act of bankruptcy by one partner, has been held to avoid an honeſt conveyance of partnerſhip effects by the other. Each has a power ſingly to diſpoſe of the whole of the partnerſhip effects.

There

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Fox versus Mansuay.

There are no words in the ſtatutes expreſsly applicable to this caſe; and there is great reaſon why they ſhould be avoided. If partners diſſolve their partnerſhip, they who deal with either, without notice of ſuch diſſolution, have a right againſt both. After a diſſolution by agreement, by an execution, or by a bankruptcy, the partner out of poſſeſſion of the partnerſhip effects, has the ſame lien on any new goods brought in, which he had upon the old. But ſuppoſing that a ſecret act of bankruptcy of *one* partner is a complete diſſolution of the partnerſhip, and that from that moment the aſſignees and the ſolvent partner are to be conſidered as tenants in common of the partnerſhip effects; the queſtion will ſtill remain, Whether the plaintiffs have any right to recover in this action?

This leads me to conſider what right in law and juſtice one partner has againſt another, after a diſſolution of the partnerſhip. —It clearly is not to change the poſſeſſion, or to make an actual diviſion of ſpecific effects. One partner may be a creditor of the partnerſhip to ten times the value of all the effects. The other partner in that caſe can only have a right to an account of the partnerſhip, and to the balance due to him, if any, on that account. No perſon deriving under the partner can be in a better condition. His executor ſtands exactly in the ſame light, It is the very text of *Littleton*. In *Sect.* 321. he ſays, "If there be "two tenants in common of a perſonal chattel, and one dies, the "executors ſhall hold and occupy with the ſurvivor, as their teſ- "tator did before he died." If a creditor takes out execution againſt one partner, as in 1 *Salk.* 392, the vendee would be tenant in common. And in the caſe of *Skipp* verſus *Harwood* in Chancery, 6th *July* 1747, Lord *Hardwicke*, according to my note, ſays, "If a creditor of one partner takes out execution againſt "the partnerſhip effects, he can only have the undivided ſhare of "his debtor; and muſt take it in the ſame manner the debtor "himſelf had it, and ſubject to the rights of the other partner."

The aſſignees, under a commiſſion of bankruptcy againſt one partner, muſt be in the ſame ſtate. They can only be tenants in common of an undivided moiety, ſubject to all the rights of the other partner. This is clearly laid down in that caſe of *Skipp* verſus *Harwood*, which is tolerably well reported in 1 *Vezey* 239.* And I refer you to that report, to avoid taking up ſo much time as would be neceſſary to ſtate it from my own notes.

* It is there reported by the name of *Weſt* v. *Skip*.

My

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Fox *verſus* HANBURY.

My general memory of the principles explained in that caſe, and the ſtrong ſenſe upon which this propoſition is founded, that one partner can have no right againſt the other, but to what is due from him after making him all juſt allowances, induced me, without heſitation, to declare my opinion at the trial; that the conſignments endorſed by *Barnes before* the 22d of *January* 1773, the day *Barnes* became a bankrupt, could not be avoided by the plaintiffs, either for the *whole* or a *moiety*, on account of the bankruptcy of *Ridgate*. But the matter being of value, and no precedent cited, I wiſhed them to take the opinion of the court.

When it was firſt argued, the defendant's counſel ſaid little or nothing, expecting to reply; which raiſed doubt enough to make us order it to be put in the paper. Now, that it is fully underſtood, we are all clearly of opinion that the action cannot be maintained.

Suppoſing the indorſement by *Barnes*, of the bills of lading, not to bind the undivided moiety of the aſſignees, which is the utm oſtthe plaintiffs can contend for, then, this is an action of *trover*, by one tenant in common againſt another, which cannot be: The text of *Littleton* ſays ſo, *Coke*'s comment ſays ſo, the adjudged caſes ſay ſo, and there is no judgment or *dictum* to the contrary. The text of *Littleton*, *Sect.* 323. is as follows: "But "if two be poſſeſſed of chattels perſonal in common, and one "take the whole to himſelf, out of the poſſeſſion of the other; "the other has no remedy but to take this from him, who hath "done the wrong, to occupy in common, *&c.* when he can ſee "his time, *&c.*" Lord *Coke*, in his comment on this paſſage, 200 *a.* ſays, "If one tenant in common takes all the chattels "perſonal, the other has no remedy by action; but he may take "them again."

So, in *Brown* verſus *Hedges*, *Trin.* 7 *Ann. B. R.* 1 *Salk.* 290. Upon a caſe made for the opinion of the court, the ſecond point reſolved was this: "One joint tenant, tenant in common, or "parcener, cannot bring *trover* againſt another, becauſe the poſ-"ſeſſion of one, is the poſſeſſion of both; if he does, it is "good evidence, upon not guilty: But if one joint-tenant bring "trover againſt a ſtranger, in that caſe the defendant may plead "it in abatement; but cannot take advantage of it in evidence." —The reaſon is unanſwerable; there is no converſion.

Upon theſe authorities, we are of opinion that the action cannot be maintained; and conſequently, that the conſignments *prior* to the 22d of *January* 1773, are not to be brought into the arbitrator's accounts.

1776.

Same day.

ROWLS *verſus* GELLS *et al.*

The leſſee (under the crown) of lead mines, is rateable to the poor for the profits ariſing from *lot* and *cope*; which are duties paid him by the adventurers, without any riſk on his part.

THIS was an action of treſpaſs, brought by the plaintiff againſt the defendants, for taking lead ore, as a diſtreſs for the poor's rate. The cauſe was tried at *Derby* at the Lent aſſiſes 1776; when the jury found a verdict for the plaintiff, damages 13 *l.* 14 *s.* ſubject to the opinion of the court, upon a caſe ſtated, which in ſubſtance was as follows:

That the plaintiff, in conſideration of 1560 *l.* paid to his Majeſty as a fine, was admitted tenant for 31 years of "all thoſe "mines of lead with their appurtenances, within the ſoak and "wapentake of *Wirkſworth*, with the *lot* and *cope* within the "ſaid ſoak and wapentake under the yearly rent of 144 *l.*"

That the plaintiff was aſſeſſed to the poor of the townſhip of *Wirkſworth*, under a monthly rate, dated the 19th of *April* 1775, in the words and figures following; "*Rowls, John*, Eſq. "for *lot* and *cope* at 500 *l. per ann.* 12 *l.* 10 *s.*" And on the plaintiff's refuſing to pay the ſame, the defendants, who were two juſtices of peace, regularly iſſued their warrant of diſtreſs; by virtue of which, the ore in queſtion was ſeiſed and ſold for the ſum of 13 *l.* 14 *s.*—12 *l.* 10 *s.* of which were detained for payment of the above rate, and the remaining ſum of 1 *l.* 4 *s.* was duly tendered to the plaintiff before the action brought.

That the duty *of lot*, payable to the plaintiff as leſſee of the crown, is the 13*th diſh* or meaſure of *lead ore* got, *dreſſed*, and made *merchantable* at all the lead mines within the ſaid ſoak or wapentake of *Wirkſworth*. That *cope* is 6 *d.* for every load or nine diſhes of lead ore *raiſed* at ſuch mines. That the ſaid townſhip of *Wirkſworth* is part of, and within, the ſaid ſoak or wapentake: And that the ſaid duties of lot and cope are paid to and received by the plaintiff, as leſſee of the crown; without any *riſque* or *expence* in working the mines: and that in the year 1775, the ſaid duties amounted to the clear ſum of 500 *l.* but that they are *uncertain*, and *vary* every year.

That all the King's ſubjects have a right to dig for and get lead ore within the ſaid ſoak and wapentake of *Wirkſworth*, paying the lord's duties, and conforming to the mineral cuſtoms uſed within the ſaid ſoak and wapentake; and that the miners, or proprietors of ſuch mines, within the ſaid ſoak and wapentake, are entitled to a privilege of uſing ſeven yards and a quarter of land, in breadth, adjoining on each ſide of the mine or vein, ſo far

far as the mine or vein extends in length, for the purpose of working the mine, which is called "quarter cord;" and his Majesty, or his lessee, is also entitled to a *mere* of ground, being 29 yards in length, in every new vein, with the like privilege of quarter cord on each side his mere. 1776.

ROWLE *versus* GELLS.

That great quantities of land, within the said soak or wapentake of *Wirksworth*, are annually rendered of little or no value, by working the mines.

That in the said soak or wapentake of *Wirksworth*, the said duties have not hitherto been assessed to the poor until the present rate; but that in the township of *Winster* in the hundred of *High Peak*, which adjoins the said soak or wapentake, his Grace the Duke of *Devonshire* has been assessed and paid to the poor's rate there for the like duties, for about 40 years last past.

That the miners or proprietors of lead mines in the county of *Derby*, have not been rated to the relief of the poor in respect of their said mines there.

The question was, Whether, under the circumstances of this case, the plaintiff was liable, in respect of the said duties, to be assessed to the poor's rate for the township of *Wirksworth*?

Mr. *Buller*, for the plaintiff, insisted, that this species of property was not assessable to the poor; and cited the case of the *governor and company for smelting lead* versus *Richardson et al. Mich.* 3 *Geo.* 3. *B. R.* 3 *Bur.* 1,341. and *Rex* versus *Vandevelt. Pasch.* 33 *Geo.* 2. 2 *Bur.* 991.

Mr. *Wheeler contra*, for the defendants. Both the cases cited are distinguishable from the present. In *Rex* versus *Vandevelt* the court held the quit-rents of a manor were not assessable; but the ground of the decision was, that the land itself was before assessed: And therefore, if the lord were liable, it would be a double assessment. In the other case, the mine itself was assessed, which could not be, on account of the great uncertainty and hazard attending the adventure. But here the mine itself is not assessed, nor are the miners in any respect affected. But it is the share of profit accruing to the lord, which is rated as incident to, and in respect of, the soil, and by way of recompence for the injury done the soil: and he compared it to the case of *Mills* which have been held rateable.

Cur. advisare vult.

Lord *Mansfield* now delivered the opinion of the court as follows:

The poor's rate is not a tax on the land, but a personal charge in respect of the land. The present is a personal charge by

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reason of the annual profits which the leſſee of the crown receives out of the land, and which is not charged at all before to the poor. In general, the farmer or occupier of land, and not the landlord, is liable to this tax. For it ariſes by reaſon of the land in the pariſh; and the landlord is never aſſeſſed for his rent; becauſe that would be a double aſſeſſment, as his leſſee has paid before.

Lead mines are not within the ſtat. 43 *Eliz.* They are in themſelves uncertain, and may prove unſucceſsful to the adventurers. Taxes therefore upon the adventurers would be hard, and they are excuſed. But the perſon, lord or landlord, who, in caſe they do prove of value, receives a ſtipulated benefit from the profits or value of them, is not excuſable upon the ſame ground: And therefore, is expreſsly charged to the land-tax, as that falls upon the landlord. He is alike liable to the poor's rate, for his viſible real property in the pariſh; though, where the poor's tax is a charge on the leſſee, the landlord does not pay in reſpect of his rent.

Where the adventurer or leſſee of the mine pays nothing, it is no double tax in any light; becauſe the lord pays, *not* for that, which the *leſſee* or adventurer is *excuſed* from paying for; but the lord pays for *his own*. It is not a mere caſual profit, but an annual revenue, *if any*; and very different from the caſual profits of a manor, which are not annual; for there may be none for years. But if the mine produces profit to the miner, the lord's ſhare is *certain*, annual, and an annual rent is paid for it conſtantly. The miner is obliged to pay certain proportions to the owner of the land. What reaſon then is there to exempt theſe proportionable revenues? It makes no difference to the adventurer; it does not prejudice or benefit him. But as ſuch obligatory payment is in reſpect of the land, the land owner ought not to receive it clearer or neater than any other part of his eſtate, when he is at no trouble, expence, or poſſible riſk. Therefore, we are all of opinion, that the plaintiff is liable to be rated for this property.

Per Cur.—*Poſtea* to be delivered to the defendants.

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FOSTER *verſus* BONNER.

Same day.

THIS was an action of treſpaſs on the caſe tried at the Lent aſſiſes at *Maidſtone* 1776, when the jury found a verdict for the plaintiff, ſubject to the opinion of this court upon a caſe ſtated, which was in ſubſtance as follows:

The plaintiff was poſſeſſed of four ancient ferries acroſs the river *Thames*, and entitled to receive certain ſums of money for carrying paſſengers over the ſaid ferries.—On the 22*d of Auguſt* 1775, the plaintiff ſued out a writ of *latitat* againſt the defendant, which was ſerved a day or two after; and in *Michaelmas* Term following, exhibited his bill and declared againſt him in a variety of counts, for erecting new ferries near the plaintiff's, and for carrying paſſengers over the river on the 17th of *Auguſt* 1775, and on ſeveral other days and times between that day and the day of the exhibiting the plaintiff's bill, *&c.* to the prejudice of the plaintiff, and to the diſturbance of his ſaid right.

It was proved at the trial that the defendant had carried ſeveral perſons over the river in the defendant's boats upon the 25*th* of *September* 1775, and at other times between that day and the trial of the cauſe; but there was no proof of the defendant's having carried over any perſon previous to the 25th of *September*.

The queſtion for the opinion of the court was, "Whether "the plaintiff, not having proved that the defendant had carried "over any perſon, *before* the plaintiff ſued out his writ of *latitat*, "was entitled to recover in this action?"

This caſe was argued on *Friday*, *May* 3d, in this term, by Mr. *Wallace* for the plaintiff, and Mr. *Morgan* for the defendant; when the court took time to conſider.

Lord *Manſfield* now delivered the opinion of the court as follows.—It is admitted, that the plaintiff, at the time of ſuing out the *latitat* upon the 22d of *Auguſt*, had no cauſe of action. It muſt alſo be admitted, that if, at the time of the *commencement of the ſuit*, the plaintiff had no cauſe of action, a ſubſequent right of action will not ſupport the preſent action brought.

The queſtion therefore is, What is the commencement of the ſuit in this caſe; or when muſt this action be ſaid to be brought?

It is laid down in *Wood* verſus *Newton*, 1 *Wilſ.* 147, that in general, the ſuing out a *latitat* is not material: that it is not

In *B. R.* if the plaintiff prove a treſpaſs or injury *before the bill filed*, though *after* the *latitat returned*, it is ſufficient. For, by the general rule and courſe of the court, the *bill* is the *commencement of the ſuit*; and the *latitat*, except where it is *replied to* the *ſtatute* of *limitations*, or to *avoid* a *tender*, or where it is *given* in *evidence* to ſupport a *penal action* in point of time, is conſidered but as *proceſs*.

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conſidered as the *commencement of the ſuit*, but as *proceſs* only to bring the party into court.—It is laid down in other caſes, in 1 *Vent.* 28. *Hanway* verſus *Merry*: in *Penny* verſus *Kirk*, *Hil.* 11 *Geo.* 1. 8 *Mod.* 343. and in *Johnſon* verſus *Smith*, 2 *Bur.* 960; and by the general courſe of this court, that the action is not deemed to be brought, till the *bill* is filed; and *that* is the *commencement* of the *ſuit*.

The form of pleading a tender of amends, or the ſtatute of limitations, ſhews this: For, as in the *Common Pleas*, where the ſuit is by original, it is pleaded, *ante impetrationem brevis*; ſo in this court, it is ſaid, *ante exhibitionem billæ*. The *bill*, therefore, is conſidered as an *original writ*; and it is the firſt ſtep on the record. The want of a bill is the common error aſſigned; as the want of an original is, in the *Common Pleas*; and both are alike cured after verdict. If the plaintiff, therefore, duly proves a treſpaſs or injury before the exhibiting the bill, it is ſufficient.

But further, that the time of ſuing out the *latitat* is not material, as before is laid down, appears from the ſtat. 12 *Geo.* 1. *c.* 29. amended by the ſtat. 5 *Geo.* 2. *c.* 27. and made perpetual by the ſtat. 21 *Geo.* 2. *c.* 3. For thereby, where the plaintiff does not hold the defendant to ſpecial bail by affidavit and a ſpecial *ac etiam*, (which he is then bound to purſue and declare accordingly,) the ſheriff or his officer can now only perſonally ſerve the defendant with a copy of the writ or proceſs; and with notice in writing thereon, to appear by his attorney in court and defend the action; which, in effect, reduces it to a mere *ſummons*. And if the defendant appears upon this notice, he puts in common bail. If he does not appear upon the return of the writ, within four, or, in ſome caſes, eight days after, the plaintiff may enter an appearance for him, and file common bail in his name.

And in ſuch caſes, where the defendant is ſo brought into court by a bill of *Middleſex*, upon a ſuppoſed treſpaſs, in order to give the court a juriſdiction, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper. So that upon ſuch a ſummons to bring the defendant into court, the plaintiff's *filing* his *bill*, is moſt properly called the *commencement of his ſuit*. That is the only thing, according to the caſes beforementioned, which were prior to the ſtatutes, that the court is to take notice of. The *latitat* may be *before* the cauſe of action; but the *declaration* cannot be, till *after* it ariſes.

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It has been frequently ſaid however, upon certain occaſions, that a *latitat* out of this court, is, or may be taken to be, in nature of an *original* in the *Common Pleas*. *Styles* 156. 1 *Wilſ.* 147. yet on a ſubſequent argument in the firſt caſe, *Styles* 178. it was not admitted in reply to the ſtatute of limitations, but adjourned on a difference of opinion.

But ſince it has been admitted in ſuch a light, the plaintiff has made it the commencement of his ſuit, to avoid the plea of the ſtatutes of limitations, or of a tender before the exhibiting his bill. The defendant has alſo had the benefit of ſhewing in ſuch a caſe, the true time of the writ's iſſuing; and, as in *Wood* verſus *Newton* *, that there was *no cauſe* of action ſubſiſting *at the time* of ſuing out the *latitat*, when the plaintiff had replied a *latitat*, to avoid the defendant's plea of a tender. The doctrine in *Joanſon* verſus *Smith* † is to the ſame effect.

* 1 *Wilſ.* 147.

† 2 *Bur.* 960.

In *Culliford* verſus *Blandford*, *Carthew* 233. and in *Hardiman* verſus *Whitaker*, *Mich.* 22 *Geo.* 2. *B. R.* the *latitat* was held a good commencement of the ſuit in a penal action to avoid a non-ſuit. The latter caſe was as follows: By the *ſtat.* 8 *Geo.* 1. *c.* 19. all ſuits and actions are directed to be brought, *before* the *end* of the *next term* after the offence committed. The offence was charged upon the 27th of *January*; the *memorandum* was of *Trinity* Term, and the declaration was, that the defendants *after* the *firſt* day of *Hilary* Term, and before the exhibiting the plaintiff's bill, *viz.* on the 27th of *January*, kept a lurcher. So that on the face of the declaration, it was after the time allowed by the ſtatute. But the plaintiff proving in fact, at the trial, when the *latitat* was ſued out, and that being within the time, it was holden ſufficient.

In all ſuch caſes the defendant has an equal advantage with the plaintiff, to ſhew the truth, as it really is, *viz.* That the action is brought or not, or that the tender is made or not, *within the proper time.*

But theſe particular caſes under the ſtatutes, do not affect the general rule and courſe of the court, as to the commencement of the ſuit in *R. B.* being by the bill. For when the ſuing out a *latitat* is not replied to the ſtatute of limitations, or to avoid a tender, or given in evidence to ſupport a penal action in point of time, it is conſidered but as *proceſs*, and not as the commencement of the ſuit. And, Mr. Juſtice *Denniſon*, in *Wood* verſus *Newton*, ſpeaking of a *latitat*, and conſidering it only as *proceſs*, ſays, "*when* the *proceſs* iſſues, is not material."

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In this case it is but *process*; and therefore, if the injury is done *before the action brought*, it is sufficient. And the action is not brought till the bill filed.

Upon the whole, *as to a latitat*; under the statute of limitations and the statutes relative to the time when penal actions are to be brought, it has there been considered in nature of an original in *C. B.* But under the general practice of the court, and the statutes to prevent vexatious arrests, it is a mere process or summons, and it's time of issuing immaterial.

Therefore we are of opinion that the verdict ought to stand.

The consequence is, that the *postea* must be delivered to the plaintiff.

THE END OF EASTER TERM.

TRINITY TERM

16 GEORGE III. *B. R.* 1776.

REX *verſus* JAMES ROUPELL.

Friday, June 7.

A *certiorari* lies to remove a *preſentment* in a court leet; and when removed, the preſentment is traverſable in *B. R.*

MR. *Dunning* had obtained a rule to ſhew cauſe why a *certiorari* ſhould not iſſue to remove a *preſentment* againſt the defendant, in the court leet of the *Savoy*, for keeping a diſorderly houſe, on which he had been amerced 50 *l.*

Mr. *Wallace* now ſhewed cauſe, and inſiſted that it had been ſettled by a variety of authorities, that a preſentment in a court leet of an offence which is *not capital*, nor concerning any *freehold*, ſubjects the party to a fine or amercement *without any further proceeding*, and binds him *for ever* after the day on which it is found; and admits of *no traverſe* to the truth of it: and cited 2 *Hawk. Pl. C. c.* 10. *ſ.* 75, where it was in terms expreſsly ſo agreed. If ſo, the court will not permit a traverſe of the preſentment here: and if not, a *certiorari* would be fruitleſs. As to the ground upon which the application has been made, that the defendant had no notice of the preſentment, and therefore has not been heard in his defence; the anſwer is that no notice is neceſſary. But ſuppoſe he were not heard; he is not without remedy, and may be heard if he pleaſes, in an action of treſpaſs which is open to him, and which is his proper remedy. Therefore he hoped the rule would be diſcharged.

Mr. *Dunning* in ſupport of the rule contended, that the defendant ought to have had *notice* of the preſentment, and an *opportunity to defend* himſelf. He ſaid, the grounds of his motion were two; *Firſt*, That the preſentment did not contain a ſufficient charge; and therefore ought to be quaſhed. *Secondly*,

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ly, that if neceſſary, it might be traverſed; which he inſiſted the party had a right to do: and cited *Rex* verſus The juſtices of *Wiltſhire*, where the court of *R. B.* directed a *mandamus* to the juſtices in ſeſſions to admit a general traverſe of a preſentment by a juſtice on view, for not repairing a highway. *Vide* this caſe, 3 *Bur.* 1,532. and 1 *Black.* 467.

After the preſentment is returned, this court may either iſſue proceſs upon it, if it ſhould be holden good; or may ſend it back to the court leet to proceed themſelves; or an action may be brought upon it. Therefore no embarraſſment can ariſe from the court granting a *certiorari*.

Mr. *Howorth* on the ſame ſide. The queſtion before the court is not, whether a preſentment in a court-leet is traverſable; but whether a *certiorari* lies to remove a preſentment in a court leet? But as to its not being traverſable; notwithſtanding the authority of *Hawkins*, it has been expreſsly determined in a caſe of *Matthews* verſus *Cary*, *Carth.* 74.* that a preſentment in a court-leet *is traverſable*. "Beſides" (ſay the court) "if this preſentment ſhould be removed by *certiorari* into *R. B.* "it is clear that it is traverſable there; and if in courts ſuperior "to the leet, *a fortiori* in preſentments at the leet." Therefore this is an authority as to both points. In 1 *Salk.* 195. exceptions were taken as to a preſentment in court-leet: And in 1 *Salk.* 200. a preſentment at a leet was removed by *certiorari* and exceptions taken to it. It is clear, therefore, that a *certiorari* does lie to remove a preſentment from a court-leet, and there is no ſtatute that takes it away.

* 3 *Mod.* 137. *S. C.*

Lord *Mansfield* wiſhed the precedents to be accurately looked into, and therefore ordered the caſe to ſtand for further argument.

Afterwards, on *Thurſday* the 20th of *June* in this term, Lord *Mansfield* mentioned this caſe, and ſaid, The court has looked very particularly into all the caſes and conſidered them attentively. And we are clear that a *certiorari* ought to go. The preſentment cannot be traverſed at the leet, but the proper method is to grant a *certiorari*, that it may be traverſed here. There are many authorities which ſay, a preſentment may either be traverſed by being removed into the *King's Bench* or in an action. It cannot be true that it is *not traverſable any where*. The defendant has never been heard at all; and it would not be juſt that he ſhould be condemned and fined unheard. And as he cannot traverſe the preſentment at the leet; he ought to have a *certiorari* to remove it in order to traverſe it here.

ASTON

ASTON Juſtice.—The old authorities are clear that there ought to be a *certiorari*. 1776.

In *Dyer* 13. *pl.* 64. *Fitzherbert* ſaid, that *Briton*, who is a good authority, ſaid, that every preſentment is traverſable which is preſented in a leet; and alſo in the ſheriff's tourne, out of which leets were at firſt derived; which is taken notice of in *Matthews* verſus *Carey*, 3 *Mod.* 137.—In *Finch* 386. *octavo* edition, it is ſaid, "the courſe is to remove ſuch preſent-"ments into the *King's Bench* by a *certiorari*, where the party "may traverſe them."

REX *verſus* JAMES ROUPELL.

It would be a ſtrange doctrine to ſay the defendant ſhould have no opportunity of being heard. This would give a court-leet a power ſuperior to that of any other juriſdiction in the kingdom; as was obſerved by Mr. Juſtice *Yates* in *Rex* v. Juſtices of *Wiltſhire*. Therefore what is ſaid in 2 *Hawk.* 71. namely, that it is not traverſable *any where*, is a miſtake. It is not traverſable in the court-leet, but it is traverſable when removed hither; and that is the reaſon why a *certiorari* ought to go.

Lord *Mansfield* added, another reaſon for granting a *certiorari* is, that the defendant may have an opportunity of taking *exceptions* to the preſentment itſelf, in point of form or otherwiſe—Therefore let the rule be made abſolute for a *certiorari*, to prevent the expence of arguing it; for we have looked very particularly into it, and are clearly of opinion, a *certiorari* will lie.

EX PARTE ADNEY.

Tueſday, June 12th.

THIS was a caſe from *Chancery* in ſubſtance as follows:

A. in conſideration of 1*l.* 10*s.* 7*d.* received of *B.* undertakes *in writing* to make himſelf liable for the due payment of a note, upon which *H.* was then indebted to *B.* and *B.* thereupon conſents to furniſh *H.* with more goods: and then *A.* before the note was due becomes bankrupt. Held that *A.*'s undertaking was intended as a *collateral* engagement only, *in caſe* H. ſhould not pay the note when due. Conſequently, as it reſted in contingency, whether it would ever become a debt or not, it could not be proved as ſuch under *A.*'s commiſſion.

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as he had no other ſecurity than the above note, he declined giving him further credit; whereupon *Adney* anſwered *Buckholme*, that *Henſhaw* was a ſafe man; that the note would be regularly paid, and that he might ſafely give him credit for more goods; that he, *Adney*, in conſideration of the ſum of 1 *l.* 10 *s.* 7 *d.* paid him as a premium, would guarantee or ſecure the payment of the ſaid note; which propoſal *Buckholme* agreed to; and paid him the 1 *l.* 10 *s.* 7 *d.* and afterwards delivered more goods to the uſe of *Henſhaw*; and *Adney*, on the 12th *July* 1773, gave *Buckholme* the following undertaking ſigned by him, *viz.* "In conſideration of the ſum of 1 *l.* 10 *s.* 7 *d.* received of "Mr. *John Buckholme*, I hereby make myſelf anſwerable for the "due payment of *George Henſhaw*'s note; date the 10th of *June*; "Order *J. Buckholme*, for 306 *l.* 13 *s.* payable in five months, "and due the 10th of *November*."

On the 8th day of *September*, 1773, a commiſſion of bankrupt iſſued againſt *Adney*; and he was declared a bankrupt. *Henſhaw* did not pay the note when it became due, but continued his trade till the 2d of *December*, 1773; when a commiſſion of bankrupt was iſſued againſt him, and he was declared a bankrupt.

Buckholme having petitioned the Lord Chancellor for liberty to prove the debt of 306 *l.* 13 *s.* under *Adney*'s commiſſion, his Lordſhip, on the petition's coming on to be heard, ordered that a caſe ſhould be made for the opinion of the judges of his Majeſty's court of *King's Bench*, upon the following queſtion: "Whether "the ſaid engagement, ſo entered into by the ſaid *James Adney*, "is or ſhall be conſidered as a *debt* due from the ſaid *James* "*Adney*, *before* the date and iſſuing forth of the ſaid com- "miſſion againſt him, ſo as to be proved by the ſaid *John Buck-* "*holme* under the ſaid commiſſion? or, Whether the ſaid en- "gagement is to be conſidered, as a *collateral ſecurity* from the "ſaid *James Adney* the bankrupt to the ſaid *John Buckholme*, "for the payment of the ſaid ſum of 306 *l.* 13 *s.* mentioned in "the ſaid note, *in caſe* the ſaid *George Henſhaw* did *not* pay the "ſame, at the time the ſaid note became payable; and conſe- "quently a debt only accruing due from the ſaid *James Adney* "to the ſaid *John Buckholme* from the time default was made "by the ſaid *George Henſhaw* in payment of the ſaid note?"

Mr. *T. Cowper* for *Buckholme*. This is a debt, which, if *Henſhaw* had become bankrupt, *Buckholme* would clearly have been entitled to prove under *Henſhaw*'s commiſſion. The caſe

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therefore is precisely the same upon *Adney*'s becoming bankrupt; because he undertakes, in express terms, to pay the amount of the note, when due. There is no condition, no defeazance, no qualification, no contingent even provided for; but he makes himself answerable for the payment of *Henshaw*'s note, payable at five months. It is in terms, therefore, a debt payable at a *future* day *certain*; and consequently, within the very letter and provisions of Stat. 7 *Geo.* 1. *c.* 31. made expressly for the relief of creditors in such cases.

Mr. *Walker contra*. This is not such an undertaking as made *Adney debtor* to *Buckholme* at the *time* of the *bankruptcy*; consequently, if *Buckholme* cannot swear that *Adney* was justly and truly indebted to him at the date and suing forth of the commission, and that he still is so, he cannot be admitted a creditor under the commission. That he cannot is plain, because *Adney* can be answerable no further than *Henshaw* himself was, and *Henshaw* was not liable to pay it till a future day, *viz.* the 10th of *November*; it was contingent, therefore, till that day at least. But this was only by way of collateral security, in case *Henshaw* did not pay; consequently, till default by *Henshaw*, *Adney* was not liable.—He cited *Goddard* versus *Vanderheyden*, *Mich.* 12 *Geo.* 3. *C. B.* * where the court determined, that bail, who had not paid the debt and costs till *after* the bankruptcy of the principal, though judgment on the bail-bond was had *before*, were not barred by the certificate of the bankrupt; because, till actual payment, the damnification did not accrue, there being till then a possibility that the effects of the defendant might pay. So here, even after *Adney*'s bankruptcy *Henshaw* might have paid; consequently the debt, if any, not having accrued till *after* the bankruptcy of *Adney*, is not such a debt as can be proved under his commission.

* 3 *Wils.* 262.

Mr. *Cowper* in reply admitted, that in *Goddard* versus *Vanderheyden* the certificate was no bar, because the bail were clearly not fixed till after the bankruptcy; and perhaps never might have been. But he compared this, to the case of *Adney*'s having joined in the note with *Henshaw*, or to his having indorsed it; in which latter case he insisted, that though *Adney* might not have been liable till after demand made upon *Henshaw* the drawer, and default by him; yet it was clearly such a debt as might be proved under *Adney*'s commission.

Lord MANSFIELD.—There can be no doubt or argument in this case upon any general principle of law. It is very certain that contingent

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It is as certain, that, if this be only a *collateral* undertaking to pay *if Henſhaw did not*, the demand cannot be proved under *Adney*'s commiſſion, But if it be an engagement by *Adney* to pay *at all events*, without regard to *Henſhaw*; then, it is a debt that may be proved under *Adney*'s commiſſion: and ſo the court of *Chancery* clearly underſtood it, by the terms in which the caſe, and the queſtion ſent for our opinion, are ſtated.

The law is equally clear, which ever way the undertaking is conſtrued: and the whole queſtion depends upon the conſtruction of three lines of the engagement. It might be meant as a collateral undertaking only; *viz.* in caſe *Henſhaw did not pay*, that then *Adney* would be liable for the debt. But it is not worded ſo.

The original undertaking by *Henſhaw* is a regular negotiable note, and if *Adney* had indorſed it, though demand muſt have been made, &c. before *Adney* would be liable, yet in that caſe the debt might clearly have been proved under the commiſſion. But the engagement by *Adney* is, that *Henſhaw*'s note ſhall be paid when due; therefore, if not a collateral undertaking, there would be no neceſſity to reſort to the original drawer of the note.

ASTON Juſtice.—The queſtion is, what was meant by this undertaking? The ſmallneſs of the premium paid to *Adney*, *viz.* only 1 *l.* 10 *s.* 7 *d.* affords a ſtrong ground for ſuppoſing it was intended as a collateral undertaking only.

Lord MANSFIELD.—The whole depends upon the intention of the parties. We will conſider of it before we give our certificate.

* *June* 19th. 1776. Afterwards * the court certified in theſe words: "Having "heard counſel on both ſides and conſidered this caſe, we are "of opinion, that from the occaſion of giving *Adney*'s note, "and the terms in which it is conceived, the parties intended "it to be a *collateral* engagement only, *in caſe Henſhaw* ſhould "*not* pay his note at the time it became due; and therefore, "it reſted *in contingency* (at the time the commiſſion iſ- "ſued againſt *Adney*), whether this engagement ever would "become a debt or not: and conſequently it could not be "proved as ſuch, under *Adney*'s commiſſion."

FOONE *versus* BLOUNT.

Tuesday, June 18th.

THIS was a case out of *Chancery* for the opinion of this court; and in substance as follows:

Winifred Warham being seised in fee-simple in possession of an estate at *Benvill* of 38 *l.* a-year, and of an estate at *Elminstone* of 12 *l.* a-year, both situate in the county of *Dorset*, by her will, dated 8th *June* 1751, gave and bequeathed many pecuniary legacies, some to *Protestants*, and others to *Papists*, amounting altogether to 895 *l.* 5 *s.* and amongst such pecuniary legacies she gave to *Ann Foone* a legacy of 25 *l*: To the children of *Charity Stroud*, deceased, of which Mrs. *Compton* is one already named, there are three more, *viz. Elizabeth Wells*, *Michael Stroud*, and *John Stroud* his brother; these must have 25 *l.* each: To Mr. *George Eveleigh*, his children by his first wife, and her sister, if living, and her children, I bequeath 100 *l.* to be equally divided amongst them: All these legacies (the *Warhams* only excepted) are for the descendants of my two great aunts, *Jane* and *Agnes Boles*; these must be paid to the *full*, whatsoever else (*debts excepted*) falls short. And then comes a clause in the testatrix's will, in the following words: "In order to raise money for these payments, my estate of *Benvill* "must be *sold* to the highest bidder, so soon after my decease "as it can conveniently be done. *To this end*, I do appoint, "constitute and *empower* Mr. *Robert Pinker* and Mr. *Noah Shen*-"*wood*, whom I make executors of this my last will, to *sell*, let, "or set to sale *both my estates* of *Benvill* and *Elminstone*."

The testatrix died, without altering or revoking her said will, which the executors proved, soon after her decease.

Upon a bill filed in 1752 by *Ann Foone* a legatee and two of the simple contract creditors, against the heirs at law *ex parte paternâ et maternâ* of the said testatrix, to have the will established, the estate sold, and the money arising by the sale, together with the personal estate, applied in discharge of the funeral expences, debts and legacies, according to the directions of the will; Lord *Hardwicke*, upon the hearing in 1756, declared the will to be well proved: and directed an account to be taken, *&c.* And a question being made in the cause, concerning the capacity of the said plaintiff *Ann Foone* to take the legacy given to her, his Lordship reserved the consideration of that question,

One seised of a real estate, by will bequeaths several pecuniary legacies, and, as to some, directs that they shall be paid to the full, whatever else, *debts excepted*, falls short: And then proceeds thus: In order to raise money for these payments, my estate of *B.* must be sold, as soon as conveniently may be after my decease. *To this end* I do appoint and empower *C.* & *D.* whom I make my executors, to *sell*, let, or set to sale both my estates of *B.* & *E.*— Held, that a creditor, who was a *Papist*, was entitled to receive his debt out of the money arising by sale of the testatrix's real estate, according to the appointment of her will.

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and alſo of any other queſtion that might ariſe, concerning the *capacity* of any other of the legatees or of any of the *creditors*, who might come before the ſaid Maſter, to claim their debts or legacies out of the ſaid teſtatrix's real eſtate.

On the 9th of *May* 1773 the maſter made his report, and on the 30th of *March* 1775 the ſaid cauſe came on for further directions; when Lord *Apſley*, the preſent Lord *Chancellor*, was pleaſed to direct that a caſe ſhould be made for the opinion of this court, and that the queſtion thereon ſhould be, "Whether a "*creditor*, who is a *Papiſt*, is entitled to receive his debt out of "the money which has ariſen by ſale of the teſtatrix's real "eſtate according to the appointment of her will."

Mr. *Wallace* for the plaintiff, argued that this deviſe to the executors was no deviſe of the eſtate itſelf, but merely a *power* to them, *as executors, to ſell* the land; which, therefore, deſcended to the heir in the mean time. That it conveyed no *intereſt* or uſe to the creditors within the ſtat. 12 *W.* 3. *c.* 4. nor could they have any claim upon the land itſelf till ſold: but when ſold, the money was legal aſſets in the hands of the executors; and conſequently the creditors, Roman Catholics or Proteſtants, have a right to be ſatisfied to the amount of their reſpective demands.

Serjeant *Glynn* for the defendant contra, recited the latter part of the fourth ſection of the ſtat. 12 *W.* 3. *c.* 4. which, he ſaid, in terms excluded Roman Catholics from any poſſible intereſt or profit ariſing out of land; by declaring, "that all and ſingular "eſtates, *terms*, or any *other intereſts* or *profits* whatſoever out of "lands, for the uſe, or in truſt for the *benefit* or *relief* of any ſuch "perſons, ſhould be utterly null and *void*." If ſo, it is impoſſible to ſay, that a creditor, who is a Roman Catholic, can take any benefit under the deviſe in queſtion; becauſe, in doing ſo, he would clearly take an intereſt and profit out of land of the teſtatrix; and that *particular intereſt* taken notice of by the ſtatute, which can apply *only* to *creditors*; namely, an intereſt for his benefit and *relief*. A Roman Catholic therefore is incapable of ſuing out an *elegit*; in ſhort, he is excluded from any poſſible intereſt or benefit ariſing out of land: and if this is not a benefit and *relief* out of land, it is difficult to ſay what is. He cited the caſe of *Roper* verſus *Radcliffe*, 9. *Mod.* 167. 208. which, he ſaid, was not exactly parallel; but by analogy was applicable to the caſe in queſtion. There, the Houſe of Lords held, that a deviſe, of the *ſurplus* of money ariſing from the *ſale* of *lands*, to a

Roman Catholic, after payment of debts, was an *intereſt* within the ſtat. 12 *W.* 3: though even in that caſe the deviſee might have been compelled to take the ſurplus of the money, and have been reſtrained from becoming purchaſor of the land. The determination, therefore, was grounded upon its being an intereſt out of land. So here, though the Roman Catholic creditors cannot acquire the land, yet they take that *intereſt* out of it, by its being applied in diſcharge of their debts, which the ſtatute has expreſsly declared they are incapable of taking. Therefore he prayed the opinion of the court in favour of the heir at law. 1776. FOONE *verſus* BLOUNT.

Lord MANSFIELD.—The ſhort ſtate of the caſe is this: The teſtatrix leaves ſeveral pecuniary legacies; and gives a preference as to ſome, by directing they ſhall be paid to the full, whatever elſe, *debts only excepted*, ſhould fall ſhort: not a ſyllable more is added about debts. Then the teſtatrix adds the following clauſe. "In order to raiſe money for theſe payments, my eſtate "at *Benvill* muſt be ſold to the higheſt bidder, as ſoon after my "deceaſe as it can conveniently be done. *To this end* I do ap- "point, conſtitute, and *empower* Mr. *Robert Pinker* and Mr. "*Noah Shenwood*, whom *I make executors of this my laſt will, to* "*ſell, let, or ſet to ſale, both my eſtates of* Benvill *and* Elminſtone." There is no diſpoſition of the reſidue, nor any further directions as to how the ſurplus was to go after payment of debts and legacies. This is no deviſe to the executors of the lands; but only a *power* and authority to them *eo nomine*, as executors, to ſell the lands for the purpoſe of paying debts and legacies.

The eſtates have been ſold and converted by the executors into money. Some of the creditors happen to be *Roman Catholics*; and the queſtion is, whether they ſhall be paid their debts out of the money, which is now legal aſſets in the hands of the executors?

The ſtatutes againſt Papiſts were thought, when they paſſed, neceſſary to the ſafety of the ſtate: Upon no other ground can they be defended. Whether the policy be ſound or not, ſo long as they continue in force they muſt be executed by courts of juſtice according to their true intent and meaning. The legiſlature only can vary or alter the law: But from the nature of theſe laws, they are not to be carried by inference, beyond what the political reaſons, which gave riſe to them, require.

The political object the legiſlature had in view, was, to take off from the Roman Catholics that weight and influence, which is naturally connected with landed property, beyond what perſonal

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ſonal eſtate can give. Therefore, where lands deſcend to a Roman Catholic, he loſes the pernancy of the profits. They are alſo incapacitated from taking real eſtate by *purchaſe*, which, it is now ſettled, comprehends every mode of acquiring property in the legal acceptation of the word: by deviſe, *&c. &c.*

The only caſe that has been cited, is that of *Roper* verſus *Radcliffe*. But that caſe, it is admitted by Serjeant *Glynn*, is not parallel to the preſent. If it were, being a deciſion of the Houſe of Lords, we muſt have been bound by it; though the judgment was againſt great opinions, and not with the approbation of the bar. But though it muſt govern parallel caſes, yet being ſo little ſatisfactory, it ought not to be carried further. That caſe came on firſt before Lord *Harcourt*, who ordered a caſe to be made for the opinion of the judges. Lord *Harcourt*, Lord *Trevor*, Mr. Juſtice *Powell*, and the Maſter of the Rolls, were all clearly of opinion, that the deviſees might take the eſtates *as money*: Firſt, upon a general principle of law, that if land is to be *ſold*, and converted into money, it is not within the reaſon and policy of the Roman Catholic laws. Secondly, upon the doctrine and principles of the courts of *Equity*, which conſider that which *is to be* done, as if it *was* done; namely, *land* directed to be *ſold*, as *money*: And *money* directed to be laid out in the *purchaſe* of *lands* and ſettled in fee, as *land*: In the latter caſe though it remain in money, and though on the credit of it a debt is contracted, yet it ſhall go to the heir, and a ſimple contract creditor ſhall not be paid out of it. It was ſo ſettled by Lord *Hardwicke* in the caſe of *Trelawney* verſus *Booth* *.

* 2 *Atk.* 307.

In the caſe of *Roper* verſus *Radcliffe*, Lord Chief Juſtice *Parker* differed in opinion from the reſt of the judges. His argument is very able, but I cannot ſay convincing to me. He ſays, "If ſuch a deviſe be not within the act, the deviſee might make "his election to pay off the debts, and keep the land; by which "means the proviſion of the ſtatute would be evaded:" And he inſtances a variety of caſes in which a deviſee is entitled to make ſuch election. And it certainly is ſo. But the defect of the argument lies here, and the objection may be anſwered thus: No, a Roman Catholic ſhall not make his election, becauſe there is a law, which ſays, that being a Papiſt he *ſhall not* take the *land*: And, therefore, a court of *Equity* would decree, that he ſhould take it as *money*. Something like it was ſaid in the caſe of *Bowes* verſus Lord *Shrewſbury* †.

† *Vide* this caſe in *Brown's Parl. Caſes*, *vol.* 5. 269.

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In common cases, where money is given to a charity to be laid out in land or government security, though a common person in a like case may elect to have the land, the charity cannot; because it is unlawful: and therefore though the election be given, yet one alternative being lawful, and the other not, a court of equity says, you shall do that which is lawful.

In the marginal note in *Bacon's Abridgment. vol.* 3. 796. title *Papists*; and which is supposed to be taken from Lord Chief Baron *Gilbert*'s notes, it is said, that "where *lands* are *devised* to, or "vested in trustees *to be sold* for payment of particular sums to several people, some of whom happen to be Papists, that this "act does not prevent such Papists from taking the particular "sums or legacies intended for them; because they cannot insist "upon paying off the other incumbrances, and holding the estate, as a person can do, to whom the *residue* of the purchase money is devised." That goes a great deal further than this case; for a legacy charged upon land is very different from a mere power to sell. But I cannot see a doubt in this case: This is only a power to the executors to sell. What is the claim of the creditors? To be paid out of legal assets. The creditor has no interest in the land. He can have no claim upon the land, nor make his election to pay off the incumbrances and keep the land. He can have nothing till the land is turned into money. Here it is turned into money. If the executors had refused to sell the land, he could only have obliged the executors to sell: and till sold he has no interest whatever. Suppose a man dies and leaves a number of leases for years: A Popish creditor cannot take a lease for years, any more than he can a fee-simple. But can there be a doubt that he would have a claim upon such lease as assets?

No precedent has been produced against the claim of the creditors in this case. I should expect a precedent before I decided that a creditor should not be paid out of the assets, only because he happens to be of a different way of thinking from the established mode of religion. Therefore I am clear that this debt ought to be paid out of the assets arising from the sale of these estates.

Mr. Justice *Aston* and Mr. Justice *Ashhurst* concurred.

Afterwards the court certified in these words. "Having "heard counsel and considered this case, we are of opinion that "a creditor, who is a Papist, is entitled to receive his debt out of "the money which has arisen by the sale of the testatrix's real "estate, according to the appointment by her will."

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Same day.

SMITH *et al.* Assignees of HAGUE, *versus* DE SILVA *et al.*

One of three partners in a ship and cargo, the cost and outfit of which was 4568*l.* pays only 410*l.* In part of his *third* share, and gives his notes for the remainder; but, before, they become due, is declared a bankrupt. The *other partners* cannot, by *voluntarily* discharging the notes, stand in his place for any share of the profits. But the assignees are entitled to a *full third* both of the profits of the adventure, and of the value of the ship.

THIS was an issue out of the court of *Chancery*, to try whether the plaintiffs, as assignees of *Edward Hague*, a bankrupt, were entitled to *one third* part of the profits of the adventure of the ship *Unanimity*, from *London* to *Africa*, from *Africa* to *Jamaica*, and from thence to *London*, and also of the sale of the ship.

This cause came on to be tried at *Guildhall*, *London*, at the Sittings after *Easter* Term 1776, before Lord *Mansfield*, when the jury found a verdict for the plaintiffs, damages one shilling, and costs forty shillings, subject to the opinion of the court upon the following case:

That in *December* 1771, *Edward Hague* the bankrupt, together with the defendants *Isaac Bernal* and *Abraham Lara*, agreed to purchase and fit out a ship for the slave trade, at their *joint* expence, and for their *joint account* and risk in *thirds*: And that the other defendant, *De Silva*, should have the conduct and management of fitting out the ship as a purser or ship's husband, for the benefit of the parties concerned. That *Hague*, in *December* 1771, purchased the ship in question for 680*l.* and soon after gave a bill of sale of one third part to the defendant *Bernal*, and to the defendant *Lara*, a bill of sale of one other third part; that soon afterwards the defendant *Lara* sold one moiety, or half part of his third part, to the other defendant *De Silva*. That *De Silva* was at the whole expence of fitting out the ship for sea, and supplying her cargo, *&c.* amounting to the sum of 4658*l.* 15*s.* 1*d.* of which, the defendants *Lara* and *Bernal* duly paid him their respective proportions: But *Hague* paid only 410*l.* 11*s.* 7*d.* in cash, and gave two promissory notes, one for 403*l.* 4*s.* 5*d.* payable at six months, the other for 739*l.* 2*s.* 4*d.* at twelve months for the remainder. That *De Silva* paid in ready money towards the expence of the outfit, the sum of 1,331*l.* 14*s.* 9*d.* only; and that he had six months credit for 1,209*l.* 13*s.* 3*d.* part of the outfit and cargo thereof, and twelve months credit for the remaining 2,217*l.* 7*s.* 1*d.* from the 1st of *January* 1772. That the said ship sailed for *Gravesend*, on or about the first of *March* 1772, and arrived safe, *&c.* That before the promissory notes so given by the bankrupt became

became due and payable, and likewiſe long before the ſhip arrived at *Jamaica*, *viz.* on the ſecond day of *July* 1772, *Hague* was declared a bankrupt. It could not be known for ſeven or eight months after, whether the ſhip would make a profitable voyage or not. The plaintiff *Nutt*, one of the aſſignees, applied ſeveral times to the defendant *De Silva* to take the bankrupt's ſhare or intereſt in the ſaid ſhip, and the profits and riſk thereof to himſelf; and to pay the plaintiffs the ſaid ſum of 410 *l.* 11 *s.* 7 *d.* being the money the bankrupt had actually paid on account thereof, which the defendant *De Silva* at firſt refuſed: but endeavoured all he could to ſell the bankrupt's ſhare in the ſhip, and the outfit and profits thereof to ſome other perſon, who would pay the 410 *l.* 11 *s.* 7 *d.* to the plaintiffs, his aſſignees, and to pay for the remainder of the outfit thereof: but not being able ſo to do, the defendants *Bernal* and *Lara*, about a month or two *after the bankruptcy of Hague*, were, after much intreaty, prevailed upon by the defendant *De Silva*, to join with him to take the remainder of the bankrupt's ſhare, equally between them, and to pay the ſaid 1,142 *l.* 6 *s.* 9 *d.* between them in equal proportions, being the remainder of the money the bankrupt had agreed to pay towards the ſhare thereof he had propoſed to take. The defendant *Bernal* accordingly paid the defendant *De Silva* one third part of the ſaid ſum of 1,142 *l.* 6 *s.* 9 *d.* and the defendant *Lara* paid him the other third part thereof; and the defendants, from that time, conſidered the plaintiffs (the aſſignees) as intereſted in the ſhare of the ſhip, ſo to have been taken and paid by the bankrupt, only as the ſum of 410 *l.* 11 *s.* 7 *d.* was to the ſum of 4,658 *l.* 15 *s.* 1 *d.* the amount of the coſts and outfit of the ſaid ſhip and cargo: And that the defendants were entitled to the remaining part of the ſhare the bankrupt had originally propoſed to take. That the plaintiff *Nutt* preſſed the defendant *De Silva* ſeveral times to pay the ſaid 410 *l.* 11 *s.* 7 *d.* and to take the ſame to himſelf, with the profits and riſk thereof.—That the firſt intelligence the defendant had of the ſhip having made a profitable voyage, was on the 24th *February* 1773. The queſtion was, Whether the aſſignees, as ſtanding in the place of *Hague*, the bankrupt, were entitled to one third, or to what other ſhare of the profits of the adventure?

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SMITH *verſus* DE SILVA.

Mr. *Manſfield* for the plaintiffs: Mr. *Dunning* for the defendants.

Lord *Manſfield*, after ſtating the caſe, proceeded thus: The adventure having proved a profitable one, the queſtion is, what

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ſhare the aſſignees of *Hague* are entitled to: Whether they are entitled to *one third* of the profits, and of the money ariſing from the ſale of the ſhip, or only to the proportion which the ſum of 410 *l.* paid in money by *Hague* towards the expence of fitting out the ſhip, *&c.* bears to the whole amount of ſuch original expence which was 4,658 *l.*? There is no difference between the rule which muſt govern the determination of this caſe in a court of law or equity. It depends upon the right of the bankrupt: And to find out what the right of the bankrupt is, it will be neceſſary to conſider *firſt*, how it ſtood at the time of the bankruptcy; and *ſecondly*, whether any alteration has happened ſince to vary ſuch right. *Firſt*, at the time of the bankruptcy, the whole expence was incurred. *Hague* was liable to *De Silva* for the amount of the notes, and a partner in thirds: The adventure was then at ſea, and *De Silva*, as purſer or huſband of the ſhip, was liable to him for the amount of his third ſhare of the profits whatever they might be. But ſuppoſe the other partners were liable to thoſe who truſted *De Silva*; the conſequence on a bankruptcy between partners is, that they are entitled as againſt each other to the balance of accounts; and ſo it was ſettled in the caſe of *Skipp* verſus *Harwood*, before Lord *Hardwicke*, in *Chancery**. Therefore, if the other partners had been obliged to diſcharge the amount of the notes which remained unpaid at the time of the bankruptcy, the aſſignees muſt have allowed the other partners the full ſum paid for the bankrupt, and could have come againſt them only for the balance due to him, if any. This is not the caſe of a *new* trading, or of a new adventure begun *after* an act of bankruptcy. In *that* caſe, it is fair to ſay, that the bankruptcy diſſolved the partnerſhip: But here, all the expence was incurred prior to the bankruptcy; and if the bankrupt by an acceſſion of fortune had had ſufficient, and the voyage had proved a loſing one, he would have been liable for the whole in proportion with the other owners. Therefore, he had clearly a right to a third of the profits at the time of the bankruptcy; and the inſolvency of the bankrupt does not vary his right. *Secondly*, there has been nothing done ſince which can make the leaſt variation: For every thing that has been done, was done without the privity of the bankrupt or of the aſſignees. Conſequently, their right cannot be varied by an agreement between other perſons, in which they were not concerned. It is immaterial whether *De Silva* pledged his own credit only to the tradeſmen, and took the ſeparate credit of the partners for the ſhare

* 1 *Ves.* 239. *et vide* FOX *verſus* Hanbury, *infra*, 445.

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ſhare of each; or whether the other partners were liable to the tradeſmen for the whole. The queſtion is, What was the right of the bankrupt? If the other partners were not liable to *De Silva* for his ſhare, yet the bankrupt, upon paying the full amount of his ſhare, was entitled to a third of the profits, as he would have been liable to a third of the loſs, if the adventure had been unprofitable. When I ſay upon payment in full, I mean payment according to law. If he had not become bankrupt, it muſt have been an actual payment of the whole of his ſhare. But as he is become bankrupt, it muſt now be a payment according to the diſtribution made by law in that caſe; which is, a proportionable dividend with the reſt of the creditors. Therefore, whether it were a profitable or a loſing adventure, cannot vary the right. The conſequence is, that the aſſignees are entitled to one third of the ſhip and adventure in queſtion.

Aſton and *Aſhhurſt* Juſtices, declared themſelves to be of the ſame opinion.

Per cur. Let it be indorſed on the *Poſtea*, that the aſſignees of the bankrupt are entitled to one third of the value of the ſhip, and of the profits of the adventure in queſtion.

N. B. I attended the argument of this caſe in *Chancery*, when Lord *Apſley* directed the iſſue. His Lordſhip ſaid, "he was extremely clear that the aſſignees were entitled to a third of the "profits of the adventure, and of the money to ariſe by the ſale "of the ſhip: That he conſidered it as one riſk; and till the "riſk was over, the account of debtor and creditor could not "be ſettled. But as it was a queſtion of law, for the ſatisfaction of the parties, he would direct an iſſue."

*** Mr. Juſtice *Willes* was abſent at the deciſion of the ſeveral caſes included in this term.

THE END OF TRINITY TERM.

MICHAELMAS TERM

17 GEORGE III. B. R. 1776.

Friday, Nov. 15th.

A. by an agreement in writing, but *not ſtamped*, articles with *B.* to grant him a leaſe for 21 years. *B.* enters and continues in poſſeſſion 18 years. But no leaſe was ever tendered by *A.* or demanded by *B.*—The agreement is a good defence in an ejectment brought by *A.*

WEAKLY *ex dim.* YEA, Bart. *verſus* BUCKNELL.

IN ejectment for lands in *Somerſetſhire*, a verdict was found for the plaintiff, ſubject to the opinion of the court on a ſpecial caſe, ſtating in ſubſtance as follows:

That on the 13th of *March*, 1758, Sir *William Yea*, Baronet, by an unſtamped agreement in writing, articled to grant a leaſe to the defendant for 21 years from *Lady-day*, 1758, at the yearly rent of 220 *l.* The defendant had been in poſſeſſion of the premiſes ever ſince, and paid the rent up to *Lady-day* laſt, according to the ſaid agreement: But no leaſe was ever granted by the leſſor of the plaintiff, or demanded by the defendant. On the 13th of *September*, 1775, notice in writing was given by the leſſor of the plaintiff "to quit at *Lady-day* 1776." The queſtion was, Whether the leſſor of the plaintiff is entitled to recover?

Mr. *Buller* for the plaintiff contended, *Firſt*, That this agreement was tantamount to a leaſe; and if ſo, it was void for want of a ſtamp, and could not be given in evidence. 3 *Bac. Abr.* 119. *Cro. El.* 33. *Moore* 861. *pl.* 31.

Secondly, If not a leaſe, it could not entitle the defendant to keep poſſeſſion againſt the landlord. It is not certain that a court of *Equity* would decree a ſpecific performance of ſuch an agreement; and if it would, a court of *Niſi prius* could not go into that queſtion. If it ſhould be conſtrued a leaſe, no tenant will in future execute a leaſe, and the crown will loſe the ſtamps.

Lord *Mansfield* ſtopped Mr. *Gould*, who was about to argue for the defendant, ſaying, there was no occaſion to give himſelf any trouble in ſo plain a caſe.

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WEAKLY *verſus* BUCKNELL.

The 1ſt point is, Whether this is a leaſe? Suppoſing it to be a leaſe, what would it avail the revenue, if a court of law ſays it is a leaſe, and therefore ought to be ſtamped; and a court of *Equity* ſays, it is an agreement and ſhall be read in evidence as ſuch, which it could not be if it were a leaſe, and void within the ſtamp acts. But it is an agreement for a leaſe for 21 years; and the defendant has been in poſſeſſion *eighteen* of them. Then the leſſor of the plaintiff gives notice to quit, and brings an ejectment. He has agreed for a valuable conſideration, not to give notice. Shall he then give notice? There might be circumſtances, perhaps, which might let him in to maintain an ejectment. For inſtance, if he had tendered a leaſe, and the defendant had refuſed to execute it, whereby the plaintiff had incurred a loſs. But here there is no ſuch circumſtance; and if the court were to ſay this ejectment ought to prevail, it would merely be for the ſake of giving the court of *Chancery* an opportunity to undo all again. If the leſſor of the plaintiff ſhould recover at law, equity would immediately ſet it right, and he would be obliged to pay the coſts of both ſuits.—If he is ſo anxious for the revenue let him grant a leaſe now.

Per Cur. Let the *Poſtea* be delivered to the defendant.

RANN, Clerk, *verſus* GREEN.

Same day.

Variance in a declaration, by deſcribing a ſtatute on which the action was brought to be a ſtatute of the 4th of *Philip & Mary*, whereas it was a ſtatute made in the 4th and 5th of *Philip & Mary*, is fatal.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* reported as follows:

This was an action of aſſumpſit, brought by the plaintiff againſt the defendant, to recover the ſum of 40 *s.* and 6 *d.* due to the plaintiff as vicar of the pariſh of *Trinity* in the city of *Coventry*, purſuant to an order made by the Lord Chancellor, the Lord Chief Juſtice of the *Common Pleas*, and myſelf, agreeable to the directions of a private act of parliament concerning tythes in the pariſh of St. *Michael* and the *Holy Trinity* in *Coventry*, paſſed in the *fourth* and *fifth* years of *Philip* and *Mary*. The declaration ſtated the act to be the *4th* of *Philip* and *Mary*, whereas the record when produced in evidence appeared to be the 4th and 5th of *Philip* and *Mary*. This, it was contended by the counſel on the part of the defendant, was a fatal variance. I was of that opinion, and accordingly non-ſuited the plaintiff; but with leave to move for a new trial without coſts; and if the court ſhould be of opinion that the variance was fatal, then the nonſuit was to ſtand.

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RANN *verſus* GREEN.

Mr. Serjeant *Hill* and Mr. Serjeant *Adair* for the plaintiff, inſiſted, *Firſt*, That this was no variance in meaning or ſubſtance: On the contrary, the 4th of *Philip & Mary* was the *true* deſcription of the ſtatute; it being made in the fourth year of their *joint* reign. *Secondly*, If a variance, it was not material; becauſe the order, and not the ſtatute, was the *giſt* of the action; conſequently the ſtatute was only matter of *inducement*; and therefore need not be ſo certainly alleged. *Co. Lit.* 303. *a*. *Thirdly*, If material, the defendant ought to have pleaded *nul tiel record*; otherwiſe the court would take it to be as ſet forth. Conſequently the objection was now too late; and cited *Spring* verſus *Eve*, 2 *Mod.* 241. *Platt* verſus *Hill*. 1 *Ld. Raym.* 381.

Mr. *Wallace*, for the defendant *contra*, contended, that the variance in this caſe, being a miſ-recital of the time when the parliament was holden, was fatal: That it is ſo laid down in 2 *Hawk. Pl. Cr.* 246. and in the caſe of *Langley* verſus *Haynes*, *Moore* 302. was expreſsly ſo adjudged. As to the objection that the ſtatute was only inducement to the action; he inſiſted it was the ground and foundation of the order, and therefore neceſſary to be ſet forth. If ſo, upon *non aſſumpſit* pleaded, the plaintiff muſt prove it as ſtated; becauſe thereby the whole declaration is put in iſſue. Here, upon the evidence produced, it appears the plaintiff has ſet forth a different ſtatute. Therefore he hath failed in the ground of his action, and the nonſuit directed was right.

Lord MANSFIELD.—It is impoſſible to get over this objection. The only queſtion is, Whether this is a variance in the deſcription of the material ground of action? In ſome reigns, as in *Car.* 2. and *Geo.* 2. it happens, that the parliament meets in one year of the reign, and continues during part of the next year. In that caſe, the method is to entitle the acts paſſed, of *both* years. But in point of law, acts of parliament which do not in words confine the commencement to a particular day, or where the commencement does not appear from the ſubject matter, refer to the firſt day of the ſeſſions: And therefore, ſuppoſing this to be an act of the 4th and 5th of *Philip & Mary*, according to ſuch method, it would in truth be a ſtatute of the 4th, and ought to be ſo ſet forth.

But in this caſe it is different. *Philip* by act of parliament has the ſtile of King: But his being ſo entitled, does not annihilate the firſt year of the reign of Queen *Mary*. Therefore, from that time the ſtatutes are entitled the *1ſt* and *2d*, the

2*d*

2*d* and 3*d* of *Philip* and *Mary*, and ſo on; that is, the 1*ſt* of *Philip* and 2*d* of *Mary*, &c. Here the declaration deſcribes the ſtatute to be the *fourth* of *Philip* and *Mary*: Upon the Parliament Roll being produced, it appears to be an act paſſed in the 4th and 5th of *Philip* and *Mary*. The ſtatute therefore deſcribed in the declaration is different from the ſtatute produced; and in fact there is no act in the ſtatute book of the 4th of *Philip* and *Mary*. 1776. RANN *verſus* GREEN.

The court will always incline to lean againſt niceties in matters of variance. But where it is in the deſcription of a ſtatute or record, it is fatal. Here the action, which is an action of *aſſumpſit*, is brought in conſequence of a right liquidated by means of the ſtatute. The ſtatute, therefore, is the only ground of action. Without it we had no authority to make the order we did: But when the order was made, the law raiſed an *aſſumpſit*. The defendant pleads *non aſſumpſit*. Is any thing clearer, than that the plaintiff, upon the general iſſue pleaded, muſt prove his whole caſe? The firſt thing to be proved here, is the ſtatute. But inſtead of producing the ſtatute ſet forth in the declaration, the plaintiff produces a different act. I am ſorry for it, but there muſt be a nonſuit.

The other three Judges concurred.

Per Cur. Judgment of nonſuit.

BADKIN *verſus* POWELL, KING, and CHANCELLOR.

Same day.

UPON ſhewing cauſe why a verdict ſhould not be entered in this caſe for the defendant *Chancellor*; the caſe, upon the report of Lord *Mansfield*, before whom the cauſe was tried, appeared to be as follows:

Treſpaſs *vi et armis* does not lie againſt a pound-keeper, merely for receiving a diſtreſs, tho' the original taking be *tortious*. Secus, if he *exceed* his *duty* and *aſſent* to the treſpaſs.

This was an action of treſpaſs, *vi et armis*, brought by the plaintiff againſt the defendants, for taking and detaining the plaintiff's cart and horſes.—The plaintiff was a running duſtman, and the defendant *Powell*, a publick ſcavenger. *Powell* and *King* detained the plaintiff's cart and horſes as they were ſtanding in the ſtreet, under pretence of their being an eſtray, and within the city of *London*; and carried them to the *Green Yard*, of which the defendant *Chancellor* was the pound-keeper; who afterwards inſiſted upon being paid the following ſums before he would deliver them up. For bringing them in, 2 *s.* for crying them, 2 *s.* for keeping the horſes, 2 *l.* 6 *s.* 8 *d.* and for care of the

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the cart 1*l.* 3*s.* which the plaintiff accordingly was obliged to pay: Upon not guilty pleaded, the jury found a verdict for the plaintiff againſt all the three defendants.

The only queſtion at the trial was, Whether this action of treſpaſs could be maintained againſt the defendant *Chancellor* the pound-keeper, who did no other act than barely receiving the horſes and cart into the pound when they were brought there; and keeping them ſeveral days till redeemed. I thought he ought to be found not guilty; but it was contended he was a treſpaſſer by continuing them in the pound, being wrongfully impounded, and the jury found him, as well as the other defendants, guilty.

Mr. *Wallace* and Mr. *Buller* ſhewed cauſe, and argued, 1*ſt*, That in *treſpaſs* all are *principals*: And here the original taking being tortious, the pound keeper, by refuſing to releaſe the cattle, till the plaintiff had diſcharged the fees and all expences, had adopted the original taking; and conſequently rendered himſelf liable. And they compared it to the caſe of *Sanderſon* v. *Baker and another*, *Trin.* 12 *Geo.* 3. *C. B.* where upon a *fi. fa.* iſſued againſt *A.* the bailiff levied the goods of the plaintiff *S.*: upon which *S.* complained to the under-ſheriff, who ſaid, "very "well; *Bolland* (the bailiff) is a raſcal; but we have ſecurity, and I "don't care." In treſpaſs againſt the defendants (the ſheriffs) for breaking the houſe and taking the goods, *De Grey*, Chief Juſtice, left it to the jury to ſay, Whether the defendants had not recognized the act of their officer *Bolland*. The jury thought they had, and accordingly found for the plaintiff damages 350 *l.* Upon ſhewing cauſe againſt a new trial, the court were unanimouſly of that opinion, and diſcharged the rule*.—2*dly*, If the defendant meant to have availed himſelf of his ſpecial authority as pound-keeper, he ſhould have pleaded it by way of juſtification, as a gaoler or any other perſon acting under a like authority muſt do; whereas, here he has relied on the general iſſue only. Therefore, on either ground, the rule for entering up a verdict for the defendant *Chancellor* ought to be diſcharged.

* *Vide* this caſe ſince reported in 2 *Black. Rep.* 832.

Mr. *Dunning* and Mr. *Davenport* in ſupport of the rule, contended, that the cart and horſes being brought to the defendant *Chancellor* as pound-keeper, and delivered to him as an *eſtray*, the original poſſeſſion by him was clearly lawful. That whether rightfully or wrongfully taken, he was obliged to receive them; and the inſtant he did receive them, they were in *cuſtodiâ legis*: conſequently, no ſubſequent *detention* could make him a treſpaſſer.

If

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If wrongfully taken, it was at the peril of the perſon bringing them; not of the pound-keeper, who has no right or power to judge of the legality of the capture; but is the officer of the law, and *miniſterial* only. And if the party wanted his property back replevin was open to him, and would have been the proper mode of taking it out of the pound-keeper's poſſeſſion. Therefore they prayed the rule may be made abſolute.

Lord MANSFIELD.—This is an action of treſpaſs againſt three defendants, for ſeizing and detaining the plaintiff's cart and horſes; and they have all pleaded not guilty. The queſtion reſerved is, Whether the defendant *Chancellor* ought to be found guilty or not?

It has been argued two ways; *1ſt*, Whether on the merits of the caſe he was a treſpaſſer? *2dly*, Suppoſing on the merits of the caſe he was no treſpaſſer, Whether by pleading the general iſſue he has not miſpleaded, and ought to have juſtified?

1ſt, Upon the merits of the caſe: It was neceſſary for the plaintiff to prove him guilty of the treſpaſs; otherwiſe the caſe ſtands, that two perſons ſeized the cart and horſes and brought them to the pound, of which *Chancellor* was the keeper. *Chancellor* has no concern in the taking or bringing them there. How then is he guilty of a treſpaſs? The pound is the cuſtody of the law: And the pound-keeper is bound to take and keep whatever is brought to him, at the peril of the perſon who brings it. There is no judgment, no direction, no written warrant or examination to be had by him.—When is the treſpaſs committed by him? He does nothing to ratify it: But only takes the cattle as he is obliged to do, at the peril of the perſon who brings them. If wrongfully taken, *they* are anſwerable, not *he*. It would be terrible, if a pound-keeper were liable to an action for refuſing to take cattle in, and were alſo liable in another action for not letting them go. If he goes one jot *beyond* his *duty* and *aſſents* to the treſpaſs, that may be a different caſe. But here he has done nothing beyond his duty: When the cattle are once impounded, he cannot let them go without a replevin, or without the conſent of the party. Upon their being releaſed he is entitled to legal fees. If he is guilty of extortion there is another remedy.

What I have ſaid is a clear anſwer to the *2d* objection, that he has not pleaded ſpecially, as it has been contended he ought to have done. No man is bound to juſtify who is not *primâ facie* a treſpaſſer. A gaoler if he has a priſoner in cuſtody is *primâ facie* guilty

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guilty of an impriſonment; and therefore muſt juſtify. But here it comes out on the plaintiff's own ſhewing, that the pound-keeper had nothing to do with the taking. The law thinks him ſo indifferent a perſon, that if the pound is broken, the pound-keeper cannot bring an action, but it muſt be brought by the party intereſted. It would be attended with terrible inconveniencies, if he were anſwerable for a wrongful taking by the perſons who bring the cattle to him; and, therefore, I am clearly of opinion there ought to be judgment for the defendant *Chancellor* in this caſe.

ASTON Juſtice.—I am of the ſame opinion. The defendant is no treſpaſſer, and therefore was not obliged to juſtify. In 2 *Jones* 214. there is a very ſenſible caſe, which determines, that if an officer do not intermeddle, but only does what belongs to his office, he ſhall not be liable to any precedent tortious act of which he could know nothing. A gaoler muſt juſtify, becauſe a priſoner cannot be delivered to him without a warrant. Therefore he muſt ſtate the warrant. But a pound-keeper has nothing to do with the taking, he has only to put the cattle, *&c.* into the pound; the inſtant they are in the pound, they are in the cuſtody of the law; and if the pound is broken, he cannot bring an action but the perſon who diſtrained them: And ſo it is expreſsly laid down in *Fitz. Nat. Brev.* tit. *de parco fracto*, 228. *Quarto* edition 1775.

Here the defendant *Chancellor* only did the duty of his office, by impounding the cart and horſes brought to him by the other defendants. The caſes, where a party concerned in any ſubſequent ſtage of the buſineſs is held liable to an action, are, where he renders himſelf ſo by *aſſenting* to the *original treſpaſs*. But here is no aſſent to the treſpaſs. Therefore, I am clearly of opinion he ought to have judgment.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred.

Per Cur. Judgment for the defendant *Chancellor*.

MOORE *verſus* MOURGUE.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* reported as follows:

This was an action brought by the plaintiff, who is a merchant at *Alicant*, againſt the defendant, his agent in *London*, for miſbehaviour in not inſuring the plaintiff's goods agreeable to his directions. The goods were a cargo of fruit; and by the letters produced in

evidence it did not appear that the plaintiff had given the defendant any particular directions how or with whom to insure; but only generally, to insure the cargo. The defendant insured with the *London Insurance-office*, who, in policies upon fruit, always put in an exception, free from *particular average*. This policy was made therefore, with that exception. The loss was not entirely a total loss; for though the goods were at first under water, some were saved. But those that were damaged would not pay the salvage of them. The jury found a verdict for the defendant: And one of them said the ground of their verdict was, because they thought he had acted *bonâ fide* to the best of his judgment. 1776.

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Mr. *Dunning* in support of the rule, insisted, that though the commission in this case was to insure generally, and no particular directions given; yet it behoved the defendant to discharge it in such manner as would effectually answer the end proposed. That the very nature of the commodity shewed it was liable to an average loss, therefore the defendant should have guarded against that danger: And there being two offices where this exception is never put in, it was gross negligence in the defendant not to insure with them. Therefore, he prayed a new trial might be granted.

Lord MANSFIELD.—The drawer of this declaration has thought it necessary to invent two grounds of action upon which to found the plaintiff's claim. *1st*, That the plaintiff had given orders to insure free of average, except general, or the ship stranded; and that the defendant had undertaken to do so. The next ground is, that he had given orders to insure in the usual and customary course. These two grounds are entirely a fiction, for there were no such orders given, and no such express undertaking: And to maintain this action, the defendant must be guilty either of a breach of orders, gross negligence, or fraud. Now all the observations which have been made to-day, were made at the trial; and were very proper for the consideration of the jury; and my direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted *malâ fide*, they should find for the plaintiff. If, on the contrary, they were of opinion that he had acted *bonâ fide* and to the best of his judgment, then they should find for the defendant. In delivering their verdict they say, 'they did not think the defendant guilty of gross negligence, or that he acted *malâ fide*.' The court therefore will not say so. The plaintiff, if he pleased, might have given orders

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orders to the defendant not to inſure at the *London Inſurance-office*; but at ſome other office where this exception would not have been inſiſted on. But he gives no directions at all. Therefore he left it to the diſcretion of his correſpondent, who, if he meant no fraud, was at liberty to elect between the underwriters. It ſeems, the *Exchange Aſſurance* and the *London Inſurance-office* differ in the form of their policy. But though the one runs a riſk which the other does not, the premium is the ſame. There could be no temptation therefore to the defendant as to his choice between them. If, upon all the circumſtances the jury had found for the plaintiff, it might have been a caſt whether the court would have granted a new trial. *A fortiori*, in a hard action, where, as no particular orders were given, there has certainly been no breach of orders; where the defendant appears to have acted *bonâ fide*, and where the plaintiff has himſelf been guilty of the firſt omiſſion in giving no directions at all, there ſeems to be no ground for the court to interpoſe againſt the defendant. Therefore, I am of opinion the verdict ought to ſtand.

The three other judges concurred.

Per Cur. Rule for a new trial diſcharged.

Tueſday, Nov. 19th.

SALISBURY *ex dim.* COOKE *verſus* HURD.

A leaſe for years by a copyholder with the licence of the Lord, where the widow by cuſtom would be entitled to her free-bench if the copyholder had died, ſeiſed, defeats the widow of her free-bench.

IN ejectment for certain copyhold lands, in the manor of *Warminſter* in the pariſh of St. *Cuthbert*, *Wells*; the judge, at the trial directed the jury to find a verdict for the defendant; but gave the plaintiff liberty to move the court to ſet the verdict aſide, and to enter up a verdict for himſelf in its ſtead, if the court ſhould be of opinion with him.

Upon ſhewing cauſe againſt a rule obtained by the plaintiff as above, the caſe, by the report, appeared to be as follows: That the cuſtom of the ſaid manor was to grant copyholds for three lives, that the firſt life had a power of ſurrendering the whole eſtate, and the widow of a tenant who died ſeiſed was entitled to her free bench. That on the 6th *September*, 1763, *F.* then copyholder for three lives, ſurrendered to *Hurd*, the deceaſed huſband of the defendant; who, on the 19th of *October*, 1767, by *licence from the Lord*, demiſed to *Singer* for 99 years, by way of mortgage: Then *Hurd* died; and *Singer* aſſigned to the plaintiff. At the trial, only one inſtance of a leaſe by licence was given in evidence; whereupon it was inſiſted for the defend-

ant, the widow, that there being no ſpecial cuſtom to let by leaſe, the only way of transferring the copyhold was by ſurrender: And therefore, in this caſe, if the eſtate of *Hurd* the huſband was not determined according to the cuſtom of the manor, he muſt be deemed to have died ſeiſed of the copyhold; and the widow ſtill entitled to her free bench. The judge was of that opinion, and directed the jury to find for the defendant as above. 1776. SALISBURY *verſus* HURD.

Mr. *Kerby*, who ſhewed cauſe, inſiſted that copyhold eſtates could only be transferred by ſurrender and admittance. *Co. Cop. ſ.* 36. That there being no ſpecial cuſtom to warrant this ſort of mortgage, on the contrary only a ſingle inſtance produced, the widow ought not to be defeated of her free bench: And the huſband ſhould have been content to purſue the ordinary mode of mortgage, by conditional ſurrender. Therefore he prayed the rule for ſetting aſide the verdict might be diſcharged.

Mr. *Dunning* and Mr. *Gould contra*, contended, that the copyholder, having obtained the Lord's licence, might do what he pleaſed with the eſtate; and could have conveyed it from the wife in any form he thought fit: Conſequently, her right of free bench muſt be ſubject to the mortgage in this caſe; and cited 1 *Rol. Abr.* 508. *Poph.* 105. *Hall* verſus *Arrowſmith*.

Lord *Mansfield* being obliged to go to the Houſe of Lords ſaid, he was of opinion with Mr. *Gould*: And the reſt of the court concurring with his Lordſhip, decided the caſe immediately; and held, there was a great difference between the cuſtom of *free bench* found in this caſe, and the caſe of *Dower*. In the latter, the widow is entitled to dower of all her huſband was ſeiſed of during the coverture: But here, her right was confined to ſuch eſtate as he ſhould *die ſeiſed* of; conſequently, as between Lord and tenant, they might defeat the wife's eſtate when they pleaſed.

Per Cur. Rule abſolute for the plaintiff to enter up judgment.

Mr. *Kerby* then referred the court to *Fareley*'s caſe, *Cro. Jac.* 36. and *Freeman* 516. as in point for the plaintiff.

JENKINS *ex dim.* YATE *verſus* CHURCH.

Wedneſday, Nov. 20th.

IN ejectment, upon ſhewing cauſe why a new trial ſhould not be granted, the caſe appeared to be ſhortly this:

Tenant for life made a leaſe for 21 years; and, before the expiration of the term, died. The remainder-man in tail ſuffered the

A leaſe, void againſt a remainder-man, cannot be ſet up by his acceptance of rent.

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JENKINS *verſus* CHURCH.

the defendant to remain in poſſeſſion four or five years, received rent regularly during that time, and then gave notice to quit, and brought this ejectment. The queſtion was, Whether this acceptance of rent by the remainder-man amounted to a confirmation of the leaſe; or whether, the leaſe being void, it was incapable of confirmation?

Lord MANSFIELD.—This is a *void* leaſe and not voidable only. But if it were *merely voidable*, the acceptance of rent alone, unaccompanied with any other circumſtances, is not a ſufficient confirmation. It cannot be a confirmation unleſs done with a knowledge of the title at the time; or unleſs the remainder-man lies by and ſuffers the tenant to lay out his money in improvements, in confidence of continuing tenant. But here it is a void leaſe; and in general a void leaſe is incapable of confirmation *. Therefore the rule muſt be diſcharged.

* *Vide ſupra*, 201. Goodright *verſus* Straphan.

The three other judges concurred.

Per Cur. Rule for a new trial diſcharged.

Same day.

HARRIS *verſus* BUTTERLEY *et al'*.

In treſpaſs againſt *ſeveral*, if *any* ſuffer judgment by default, the plaintiff need only give evidence to affect the reſt. And it is matter for the jury, whether the treſpaſs proved be the ſame as that confeſſed. But the plaintiff *cannot* be *nonſuited*.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, *Aſhhurſt* Juſtice reported from Mr. Barron *Perryn* as follows:

This was an action of aſſault and falſe impriſonment, brought by the plaintiff againſt four defendants: *viz.* *Samuel Butterley*, *John Moore*, *Richard George*, and *Humphry Woolrich*. Two of the defendants, *viz.* *Butterley* and *Moore*, pleaded not guilty, on which iſſue was joined. The other two, *viz.* *George* and *Woolrich*, ſeverally ſuffered judgment to go againſt them by default. At the trial, *Thomas Tranter*, on the part of the plaintiff, ſwore he ſaw the plaintiff in company with *Butterley* and *Moore*, *no other perſon* being then with them, and they were taking the plaintiff gently down to the gaol. That when they came to the goal, *Butterley* put the plaintiff in the dungeon, and Mrs. *George*, the wife of the defendant *George*, locked him in. But that he never ſaw the defendant *George* or *Woolrich*, during the whole time. The next witneſs ſwore the defendant *Woolrich* had acknowledged to him, he was with *Butterley* and *Moore* when they took the plaintiff to gaol. And there the plaintiff reſted his caſe. The counſel for the defendants called no witneſs: But inſiſted, that as the aſſault and impriſonment were laid, it was incumbent

cumbent on the plaintiff to prove a *joint* aſſault and impriſonment by *all* the defendants. That although the confeſſion of the defendant *Woolrich* might be ſufficient to affect himſelf, yet it was not evidence againſt the other defendants; and that there was no evidence againſt the defendant *George*. On the other ſide it was contended, that the confeſſion of the defendant *Woolrich* was ſufficient againſt all the defendants; and that the acts of Mrs. *George* would charge the defendant *George* her huſband.

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Upon the whole, I was of opinion, the evidence was not ſufficient to ſupport the declaration; eſpecially as the witneſs *Tranter* was preſent at the gaol, and did not ſee the defendant *Woolrich* there: And I was going to ſum up the evidence and to have delivered that opinion to the jury, and to have taken their verdict. But having intimated that opinion, the plaintiff's counſel called on the defendant's counſel to aſk for a nonſuit; which he declining, the plaintiff's counſel deſired the plaintiff might be called; which was thereupon accordingly done, and a nonſuit entered.

Mr. *Bearcroft*, who ſhewed cauſe, ſaid, he was ready to admit, that where treſpaſs is brought againſt *four*, and *two* ſuffer judgment by *default*, it was the ſame with reſpect to thoſe two as if the treſpaſs had actually been proved againſt them. But he inſiſted, that to make it a *joint* treſpaſs, the plaintiff ought to prove a treſpaſs by the other two jointly with thoſe who let judgment go by default; and cited 2 *Salk.* 455. *Lover* v. *Salkeld*, where it was ſaid, "A *non-pros* might be entered "after interlocutory judgment, as well as before." *Secondly*, Suppoſing the nonſuit was wrong, it was obtained by a trick, and at the requeſt of the plaintiff's counſel; and therefore prayed the rule might be diſcharged.—Mr. *Dunning*, *contra*, contended, that it was ſufficient for the plaintiff to prove his caſe againſt the two defendants, who denied the treſpaſs, without connecting them with the other two, who had ſuffered judgment by default. The latter certainly admit the treſpaſs: all that remains, therefore, is, for the plaintiff to prove it upon the other two; and that being fully done in this caſe, the nonſuit was clearly wrong, and ought to be ſet aſide.

Lord MANSFIELD.—This is an exceedingly plain caſe. As to any art, *that* is to be laid entirely out of the queſtion. It has been often laid down, that if a judge gives it as his opinion that the plaintiff ſhould be nonſuited, and counſel ſubmit to his direction, it is not to be imputed as a fault of the counſel.

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It is impoſſible for the plaintiff to be nonſuited in this caſe; for there cannot be a nonſuit againſt him in reſpect of thoſe who ſuffered judgment by default.

Secondly, The evidence given was moſt clearly proper evidence to be left to the jury: For the plaintiff need only bring evidence to affect thoſe who have pleaded not guilty, and denied the charge. If there had been evidence to ſatisfy the jury that they were quite different treſpaſſes, that would have been matter for the jury to give their opinion upon. The two who let judgment go by default, admit the treſpaſs charged in the declaration. Then in all events it is a matter of fact to be left to the jury, whether the aſſault proved to have been committed by the two who pleaded, was the ſame aſſault as that which ſtands confeſſed on the record by thoſe who let judgment go by default, or a different one. Here one of the defendants, who ſuffered judgment to go by default, was the gaoler, to whom the defendants, who pleaded not guilty, delivered the plaintiff. Upon theſe circumſtances, the court is under a neceſſity to ſet the nonſuit aſide, becauſe it is a matter that has not been tried.

Aſton, *Willes*, and *Aſhburſt*, Juſtices, concurred.

Per Cur. Rule for a new trial abſolute, and the nonſuit ſet aſide without coſts.

Friday, Nov. 22d.

RATCLIFFE *verſus* EDEN, *et al.*

If perſons, riotouſly aſſembled, demoliſh the doors and windows of a houſe, and having thus riotouſly obtained an entrance into the houſe, deſtroy the goods and furniture in it, the *hundred* are anſwerable in an action on the ſtat. 1 *Geo.* 1. *c.* 5. *ſect.* 6. for the damage done to the furniture as well as to the houſe.

THIS was an action on the caſe, on the ſtat. 1 *Geo.* 1. *ſt.* 1. *c.* 5. *ſect.* 6. againſt the hundred of *Weſt Derby*, in the county of *Lancaſter*, for damages done to the plaintiff's houſe and furniture by rioters. The declaration conſiſted of two counts. *Firſt*, That more than twelve perſons riotouſly aſſembled themſelves and *demoliſhed* the plaintiff's *dwelling houſe in part*. *Secondly*, For demoliſhing part of a certain other dwelling-houſe of the plaintiff's, together with the *goods* and *chattels* of the plaintiff then and there being *in the dwelling-houſe*, and wherewith the ſaid dwelling-houſe was furniſhed. The defendants pleaded not guilty; upon which iſſue was joined. Before the trial came on, the attornies for the plaintiff and defendants entered into the following agreement, which was afterwards made a rule of court. "That a verdict ſhould paſs againſt the defendants on the firſt "count, for the ſum of 38 *l.* 8 *s.* 9 *d.* being the amount of the "damages ſuſtained by the plaintiff, by the *demoliſhing in part*

"*his*

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" *his dwelling-house*: And on the 2*d* count for the sum of 128 *l.* " 18 *s.* 11 *d.* being the amount of the damages sustained by him " in the *demolition* and loss of sundry *goods* and *furniture*, his " property, *then and there destroyed* by the said rioters, subject to " the opinion of the court on the following case."

" The plaintiff was a joiner in the town of *Liverpool*, but had " lately been concerned in the *African* trade. In *August*, 1775, " some sailors in the town of *Liverpool* caused a great riot, and " the plaintiff being very active in attempting to suppress it, the " rioters threatened to attack his house. But he having intima- " tion of their intention, secured his doors and window-shutters " in the best manner he was able. However, the rioters, armed " with different sorts of weapons, such as guns, cutlasses, and " bludgeons, determined to do all the mischief they could. And " on the 29th of that month, being assembled to the amount of " hundreds, amongst whom were 50 or 60 sailors, armed in " manner aforesaid, *broke open the window-shutters*, *forced the* " *door*, and *demolished a great part of the dwelling-house* of the " plaintiff, to the amount, upon a moderate computation, of " 38 *l.* 8 *s.* 9 *d.* And *having in this riotous manner obtained an* " *entrance* into the house, they *destroyed the furniture* and house- " hold goods of the plaintiff to the amount of 128 *l.* 18 *s.* 11 *d.* " upon a moderate computation."—It is alleged on the part of the plaintiff, that the damage to the furniture was *consequential* to the demolition of the house in part as above stated.—On the part of the defendants it is alleged, that the damage done to the goods and furniture is a *substantive* and *separate* injury, and not provided for by the statute 1 *Geo.* 1. *c.* 5. *sect.* 6.

Mr. *Wood* for the plaintiff stated the questions to be two. 1st. Whether the plaintiff was entitled to recover damages for the destruction of the furniture? 2dly. Whether he was entitled to costs? and he was proceeding to argue, but Lord *Mansfield* called on the counsel for the defendants to go on.

Mr. *Wilson* for the defendants admitted the plaintiff was entitled on the 1st count; the facts found, clearly amounting to a demolition of the house in part. As to the 2d count, he stated the question to be, Whether destroying the furniture was demolishing the house in the whole or in part, within the meaning of the statute; and he insisted it was not. Before the statute, no action whatsoever could be maintained against the hundred in respect of the mischief which the statute has now provided for. That mischief is in terms described by the act, and confined to

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the *particular* case of *riotously demolishing or pulling down* a house in whole or in part. But no mention is made of the destruction of furniture; nor was it at all in contemplation of the legislature at the time. It is not a necessary consequence of the house being pulled down, but a separate independent act. To prove that an action will lie in this case, it must be shewn that the hundred would have been liable, if the furniture alone had been destroyed, and no damage whatsoever done to the house. For instance—Suppose the rioters had entered, the door being open, and then demolished the furniture only. That clearly would not have been within the act. Therefore this case is neither within the words or meaning of the act. This appears further from the provision in the statute* relative to the pulling down a church or conventicle; in which case the statute makes the hundred liable, and directs the damages recovered to be applied towards rebuilding the church. Suppose the chalices, *&c.* are destroyed; can this provision be extended to replacing them or any other part of the furniture of the church? Certainly not. Acts of parliament of this kind have not been so beneficial as it was supposed they would be, and in general have been afterwards restricted. The statute of *Winton*, 13 *Ed.* 1. *st.* 2. *c.* 2. which gives an action against the hundred generally if the party is robbed, is not extended but restrained by the stat. 27 *Eliz. c.* 13: And in construction too it has always been restrained. Another circumstance which shews that this act ought not to be extended by construction, is the provision which the legislature has thought fit to make by the stat. 9 *Geo.* 1. *c.* 22. in case a house is burnt. A person who had burnt a house would not have been within this act of parliament. Again: This act of parliament appears by the preamble to have been made on a particular occasion; which no longer exists. It would be hard therefore to make one set of men liable for the delinquency of another, by construction or implication. For these reasons he submitted the defendants were entitled to judgment on the first question.

* Sect. 6.

Mr. *Wilson* was about to proceed to the second question; but Lord *Mansfield* said, The general principle is decided, that the party grieved is always entitled to costs; as in an action for a false return of a member of parliament, and in many other cases that might be put.

Mr. Justice *Aston*.—This is a remedial, not a penal law, and so is the statute of *Winton*, 13 *Ed.* 1. Here the plaintiff is the party grieved: Therefore clearly entitled to costs.

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Lord MANSFIELD.—I can ſee no doubt on this queſtion:— Theſe riots are not only injurious to individuals, but dangerous to the ſtate: And though the particular circumſtances of the time gave riſe to the act, yet they gave riſe at the ſame inſtant to a general law to continue in force after the particular occaſion itſelf had ceaſed.

What is the proviſion made by the ſtatute, if an outrage like the preſent is done by an armed force aſſembled together to the number of twelve? It alters the nature of the offence. It was before only a treſpaſs, but being done by an armed force, the legiſlature thought the conſequences ſo dangerous, that they have enacted it ſhall be felony, and have made it capital.

If the act had never been made, the treſpaſſers would have been liable to anſwer for the *whole* injury in damages. To encourage people to reſiſt perſons thus riotouſly aſſembled, and to reward thoſe, who, by doing their duty, ſhall have incurred their reſentment, the ſame law has made a further proviſion, that as the treſpaſſers are to be hanged, the country ſhall pay the damages: And this, by way of inducement to the inhabitants to be active in ſuppreſſing ſuch riots, which it is their duty to do; and which being thus made their intereſt too, they are more likely to execute. This is the great principle of the law, that the inhabitants ſhall be in the nature of ſureties for one another. It is a very ancient principle; as old as the inſtitution of the decennaries by *Alfred*, whereby the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. The ſame principle obtains in the ſtatutes of hue and cry. It is the principle here. The ſtatute ſays, the hundred ſhall be anſwerable in damages, occaſioned by ſuch demoliſhing, or beginning to pull down and demoliſh. What is the caſe here? The *whole* is *one* act. The mob force in at the doors and windows, and by one continued act deſtroy part of the houſe and many of the goods. There is no diſtance in point of time, but it is one continued act without intermiſſion. What was the jury to do? To eſtimate the damage occaſioned by the act. If a witneſs had given evidence that he had ſeen a perſon taking down the glaſſes, *&c.* would not that have been evidence of ſuch perſon being a party concerned in pulling down the houſe? By the deſtruction of the furniture the damages ſuſtained are of a larger amount; but the hundred is equally liable. It would be a very critical diſtinction indeed to ſay, that where a houſe is pulled down it is no part of the damages ſuſtained to pull down the glaſſes, *&c.*: Or if a church is

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demoliſhed, to pull down the pulpit. It is going on a verbal adherence to the words, without regard to the meaning. If there had been any diſtance of time, or if the goods had been carried out of the houſe and then deſtroyed, it might have been a different thing, becauſe that would have been a *diſtinct* act. But there is no drawing the line in this caſe, between actually demoliſhing the houſe and deſtroying the furniture. It comes therefore very near the caſe of pulling down the whole houſe and thereby cruſhing the furniture.

ASTON, Juſtice.—The object and principle of this act was, to transfer the damages occaſioned by the treſpaſs, from the rioters to the hundred; to make it felony in the offenders themſelves, and to put the party injured in the ſame ſtate as before. It is a remedial law, and ought to be extended.

ASHHURST, Juſtice.—If the houſe had been burnt, there could have been no doubt; and here it was all one continued act: Therefore the hundred is liable for the damage done to the goods, as well as for that which was done to the houſe.

Lord MANSFIELD.—I ſee in the caſe it is ſtated as if this were a *conſequential* damage. But it is not: It is the very act. If the rioters had broke down the doors and demoliſhed the windows and left the houſe, and afterwards ſomebody had come in and deſtroyed the furniture, there it would have been conſequential damage. But I conſider this as *one continued* act, and the ſame as if the goods had been deſtroyed by pulling down the houſe.

Per Cur. Poſtea to be delivered to the plaintiff.

Saturday, Nov. 23d.

SYMMERS *et al. verſus* REGEM, in Error.

One information *only*, may, by leave of the court, be exhibited under the *Iriſh* ſtatute 19 *Geo.* 2. *c.* 2. *ſect.* 4 againſt *different* perſons, and againſt the *ſame* perſons, for uſurping *different* franchiſes: And there is no neceſſity to ſtate ſuch leave upon the record.

THIS was a writ of error from a judgment of the court of *King's Bench* in *Ireland*, in *quo warranto*, againſt *Alexander Symmers*, *James Brown*, *George Staunton*, *Franklin Kirby*, *Abraham Marſhall*, and *Thomas Grubb*; to ſhew by what authority they claimed to exerciſe the privileges and franchiſes of *freemen*, *free burgeſſes*, and *common councilmen* of the town and borough of *Galway*.

The information ſet forth, that the borough of *Galway* is a town and borough incorporated by the name of the mayor, ſheriffs, free burgeſſes, and commonalty of the town and county of the town of *Galway*, and that a common council is a conſtituent part of the ſaid corporation. That the mayor, ſheriffs, recorder,

corder, town clerk, and all other officers of the ſaid town of *Gal-* 1776.
way, are to be elected and choſen only by the *mayor*, *ſheriffs*, and
common council of the ſaid town. And that the ſix defendants
have uſed and exerciſed the franchiſes of freemen, free burgeſſes,
and common councilmen, without any lawful authority whatſo-
ever.

SYMMERS *verſus* REGEM.

The defendants by way of plea ſet forth, that the town and Plea.
borough of *Galway* is, and from time immemorial hath been,
an ancient town and borough; and that the mayor, ſheriffs, free
burgeſſes, and commonalty thereof, at the time of granting
of the letters patent herein after mentioned, was a body corporate
in deed, fact, and name, and that from time immemorial there
was and yet is a *commonalty* conſiſting of an indefinite number of
freemen; and alſo an indefinite number of free burgeſſes; and
alſo a common council, conſiſting of an indefinite number of
members duly elected, admitted, and ſworn into the places or
offices of common councilmen. That the ſheriffs for the time
being have been members of the ſaid common council, and alſo
of a tholſell or general aſſembly of the ſaid town; and ſay,
that the mayor, ſheriffs, recorder, town clerk, and all other
officers of the ſaid town of *Galway*, have been, and are for the
future to be elected and choſen only by the mayor, ſheriffs, and
common council preſent, on the days whereon ſuch elections
were uſually made.

That from time immemorial the cuſtom hath been, that the
mayor or other the chief officer and *common council* of the ſaid
town for the time being, or *the greateſt number* of the *ſaid com-*
mon council preſent, did and might, being duly aſſembled from
time to time, *elect* ſuch other diſcreet perſons, not diſqualified by
any law in being, *members* of the ſaid *common council*. That from
time immemorial the *electing* of any *perſon* or perſons to be *free-*
men or free burgeſſes, ſhall be by the ſaid *tholſell* or *general aſſem-*
bly. That by certain rules, orders, and directions made and
eſtabliſhed by the Lord Lieutenant and council of the realm of
Ireland, on the 23d of *September* 1672, for the better regulating
of the corporation of the town of *Galway*, and the electing of
magiſtrates and officers there, in purſuance of the ſtat. 17 & 18
Car. 2. intitled "An act for the explaining of ſome doubts
"ariſing upon an act, intitled an act for the better executing of
"his majeſty's gracious declaration, for the ſettlement of his
"kingdom of *Ireland*, and ſatisfaction of the ſeveral intereſts
"of adventurers, ſoldiers, and other his ſubjects there, and for

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" making ſome alterations of and additions unto the ſaid act; " for the more ſpeedy and effectual ſettlement of the ſaid king- " dom," it is directed, " that no perſon or perſons, that ſhall be " elected either mayor, recorder, ſheriff, treaſurer, alderman, " town clerk, or one of the common council, ſhall be capa- " ble of holding, *&c.* until he or they ſhall have taken the *oath* " of *ſupremacy* therein mentioned, and the *oath* of *allegiance*, " beſides the oaths uſually taken upon the admiſſion, *&c.* and " alſo an oath in the ſaid rules preſcribed, commonly called the " little oath. That *no matter* or thing in any wiſe relating " to the affairs of the ſaid town, ſhall be *propounded* or debated " in the *Tholſell*, or any general aſſembly of the ſaid town, " *until* the ſame ſhall have *firſt paſſed* the *common council* of " the ſaid town." And it is further ordered, " That all " foreigners, ſtrangers, and aliens, as well others as Proteſtants, " who are or ſhall be merchants, traders, artizans, artificers, ſea- " men, or otherwiſe ſkilled in any myſtery, craft, or trade, who " were then *reſiding* and inhabiting within the ſaid town of " *Galway*, or who ſhould at any time hereafter come into the " ſaid town of *Galway*, with *intent* and reſolution to *in-* " *habit* and *reſide*, upon payment down or tender of 20*s.* " by way of *fine*, unto the chief magiſtrate or magiſtrates, " and common council, or other perſons authoriſed to admit " and make freemen, be admitted freemen *during his* or their " *reſidence* for the moſt part, and no *longer*." That King *Charles* the 2d, by his letters patent the 14th of *Auguſt*, in the 29th year of his reign, did grant, " That the ſaid town of *Gal-* " *way*, and all caſtles lying within the ſpace of two miles from " every part of the ſaid town of *Galway*, be one entire county " of itſelf: And that there ſhould be for ever thereafter, one " new body corporate and politic in deed and name, conſiſting " of one mayor, two ſheriffs, and free burgeſſes, and commonalty, " by the name of the mayor, ſheriffs, free burgeſſes, and com- " monalty of the ſaid town and county of the town of *Galway*;" And did thereby make certain perſons particularly named in the ſaid letters patent, to be free burgeſſes: And grant, " that " the ſaid perſons ſo particularly named, and made free burgeſſes, " as alſo their ſucceſſors, and likewiſe all and every ſuch perſon, " and perſons as ſhould be of the common council of the ſaid " town, *before* they be *admitted* into their reſpective offices, " places or employments, *ſhould take* as well the ſaid herein " before mentioned *oaths of ſupremacy and allegiance*, and the " oath

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" oath commonly called the *little oath*, and alſo the *oaths there-*
" *tofore uſually* taken, for the due execution of the ſaid places
" and offices; the *ſaid ſeveral oaths* to be *adminiſtered* by the
" *mayor*, or recorder, and *two of the free burgeſſes* of the ſaid
" town:" which letters patent the then mayor, ſheriffs, burgeſſes, and commonalty accepted of.—That by an act of parliament made in the 4th year of the reign of *George* 1ſt, intitled " an act for the better regulating the town of *Galway*, and " for the ſtrengthening the Proteſtant intereſt therein," it is enacted " that no perſon ſhall be *elected mayor* or ſheriffs, or com-
" mon councilmen, who ſhall not be an *inhabitant* or inhabitants
" within the ſaid town and liberties thereof, at the time of being
" elected into any of the ſaid offices, reſpectively; and that hath
" or have not been reſident for the ſpace of one whole year before
" ſuch election; and that *all* perſons who profeſs themſelves of
" any *trade*, myſtery, or handicraft, that do or ſhall come to
" *reſide* in the ſaid town of *Galway*, in order to follow their re-
" ſpective trades, *ſhall and are hereby declared to be free* of the ſaid
" town and corporation, and alſo of that company or corpora-
" tion to which their reſpective trades belong, *without paying any*
" *thing for ſuch freedom*; and ſhall continue freemen of ſuch
" company or corporation *as long as they dwell* in the ſaid town,
" and *no longer*: PROVIDED, that no perſons are to have the
" benefit of their freedoms as aforeſaid, unleſs they have been
" profeſſed *Proteſtants* for *ſeven* years, or upwards, next *before*
" their *demanding* their *freedoms*, purſuant to this act; and ſhall
" alſo take the uſual *oaths* of *freemen*; and alſo the *oaths of al-*
" *legiance, and ſupremacy, and abjuration*; and make and ſubſcribe
" the *declaration againſt tranſubſtantiation, before the mayor* of
" the town, who is required to adminiſter the ſame."

The plea then ſet forth that *Symmers*, *Brown*, and *Staunton*, were, on the 22d of *November* 1771, *duly elected* freemen and free burgeſſes, their election and admiſſion having firſt paſſed the common council and been propounded in the *Tholſell*.—The defendants *Marſhall* and *Grubb* ſetting forth that they were *tradeſmen*, *Proteſtants for ſeven years*, and *reſidents* within the town, further pleaded, that on the 4th of *February* 1772, an aſſembly or meeting of the mayor and common council was in due manner holden at the *Tholſell*, and that they then and there *offered to take the oaths* of allegiance, ſupremacy, and abjuration, and *demanded* from the mayor of the ſaid corporation and the *common council* there aſſembled their freedom, purſuant to the ſaid laſt mentioned

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mentioned act of the 4 *Geo.* 1: And thereupon the *electing and admitting* them the ſaid *Abraham Marſhall* and *Thomas Grubb* to be freemen of the ſaid town *&c. paſſed the ſaid common council.* That afterwards, to wit, the 5th day of *February* 1772, a *tholſell* or general aſſembly was in due manner held at the *Tholſell*, and then and there the *electing and admitting* them the ſaid *Abraham Marſhall* and *Thomas Grubb* to be freemen was *propounded*, and they were *then and there* in *due manner elected* by the ſaid *tholſell, freemen* of the ſaid town and corporation. *All* the defendants further pleaded, that they were in due manner elected into the reſpective offices of free burgeſſes and common councilmen, and that being ſo elected into the offices of freemen, free burgeſſes and common councilmen, they did, before they were admitted, take the oaths of allegiance, ſupremacy and abjuration, *&c.* and all the oaths uſually taken, *&c.* before the *mayor* and *two free burgeſſes.*—The *replication* took iſſue that the defendants were "*not elected* in *manner and form* aforeſaid "into the offices of *freemen*, free burgeſſes, and common council-"men reſpectively." And at the trial all the iſſues were found for the Crown.

The defendants, in ſupport of their title, gave in evidence the corporation books, in which were contained entries of their reſpective elections.

On the part of the proſecutor a witneſs was produced, who gave in evidence, out of the corporation book ſo produced by the defendants, the orders of elections of *nineteen* perſons there named; and further gave in evidence, that upon the elections of the defendants in the common council, on the 21ſt of *November* and 4th of *February*, ſeveral of the nineteen, to wit, *ten* on the 21ſt of *November*, and *twelve* on the 4th of *February*, who were freemen, free burgeſſes and common councilmen, and who had done ſeveral corporate acts, tendered their votes againſt the elections of the defendants. That the mayor rejected their votes; and that if they had been permitted to vote, that is to ſay, the ten on the 21ſt of *November*, and the twelve on the 4th of *February*, there would have been a majority againſt the reſpective elections of the defendants.

The counſel for the defendants then gave evidence of the *diſfranchiſement* of *all* the nineteen perſons, before the time of the elections of the defendants, by producing the orders of diſfranchiſement in the ſame corporation book.

That thereupon the relator's counſel gave in evidence ſeveral orders out of the ſame book, by which it appeared that *fifteen* of the

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the ſaid nineteen perſons had been *reſtored* in purſuance of peremptory writs of *mandamus*, which fifteen included the ten who had done corporate acts, and whoſe votes were refuſed on the 21ſt of *November*, and the twelve who had alſo done corporate acts, and whoſe votes were refuſed on the 4th of *February*; but by the dates of the orders, the reſtoration of the fifteen appeared to have been *ſubſequent* to the *election* of the defendants.

Whereupon, and after the ſaid entries and alſo another entry had been read, the counſel for the defendants did object thereto. For that the ſaid *entries* of reſtoration in the ſaid book were not admiſſible evidence, without firſt producing the *mandamuſes*, and returns, or *atteſted copies* thereof. But the juſtices overruled the objection, and did permit the ſaid matter to go to the jury as evidence of the reſtoration of the ſaid perſons without producing the writs, returns, or atteſted copies.

And thereupon the defendants' counſel, to prove the ſaid iſſue, and that the defendants were duly elected, did produce, give in evidence, and read the ſtat. 4 *Geo.* 1. by the defendants particularly pleaded; and offered to give in evidence, that the ſaid ſeveral perſons (the 15 who had tendered their votes and done corporate acts) were not inhabitants, *&c.* and reſident for one whole year before their reſpective elections; and did inſiſt that ſuch evidence ought to go to the jury, which the juſtices refuſed to admit. Upon which, the defendants' counſel tendered a bill of exceptions to *Godfrey Lill*, Eſq. the judge of aſſiſe, which he ſealed.

The bill of exceptions having been returned into the court of *King's Bench* in *Ireland* as part of the record, the judges, after hearing arguments upon it, gave judgment of *ouſter* againſt all the defendants; whereupon this writ of error was brought.

Mr. *Buller* for the plaintiffs in error, argued, that this information was bad; 1*ſt*, becauſe filed againſt *ſix* different perſons, for uſurping *three* different offices. That ſuch an information would clearly have been bad at common law. In 2 *Strange* 921. *ſix* were indicted for perjury, and judgment was arreſted ſolely on that ground. In 1 *Str.* 623. an indictment againſt ſix for exerciſing a trade, was quaſhed. In *Rex* verſus *Tucker et al. Paſch.* 7 *Geo.* 3. *B. R.* 4 *Bur.* 2,046. an indictment againſt *eleven*, was quaſhed for the ſame cauſe. 1 *Barnard.* 24. So in *quo warranto*, ſeveral cannot be joined. *Rex* verſus *Jarvis* and *Clarkſon. Tr.* 10 *Geo.* 1. MSS. If not good at common law, the next queſtion is, Whether it is aided by the *Iriſh* ſtatute 19 *Geo.* 2. *c.* 12. which directs, "that it ſhall be "lawful for the proper officer of the court, to exhibit one or "more

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"more informations againſt any perſon or perſons uſurping "offices, and to proceed thereon in ſuch manner as is uſual in "*quo warranto*; and if it appears that divers rights may be deter- "mined on one information, one ſhall be ſufficient to try them." This ſtatute muſt be conſtrued with ſome reſtriction; otherwiſe, the words themſelves would carry a meaning nobody could contend for; and authoriſe an information againſt the mayor of one corporation, the aldermen of another, and the freemen of a third. The true conſtruction muſt be to confine it to caſes where the offices or franchiſes, are in the *ſame corporation*, and *ejuſdem generis*. But here, the offices are of a *different nature*. Again, the ſtatute gives no authority to join *different claims*, but ſpeaks merely of joining *different perſons*. Therefore, if this information had been filed againſt *one* defendant only, and had charged him, as in this caſe, with uſurping the *three* different offices of freeman, free burgeſs, and common councilman, it would have been equally bad. There is no precedent of ſuch an information, and the practice is univerſally againſt it. But ſuppoſe this were a caſe within the ſtatute, and that the court could give leave to join different claims; it does not appear, that any ſuch leave was given or any diſcretion exerciſed by the court on the occaſion. Therefore, it muſt be taken to be an information at common law. Where ſeveral pleas are pleaded, it is the practice to ſtate, that they are pleaded by leave of the court: And ſo it ſhould have been done here.

2*dly*, As to the iſſues and the judgment on them, *two* of the defendants, *Marſhall* and *Grubb*, have ſtated their right to the offices of freemen in virtue of their being *reſident proteſtant traders* within the ſtat. 4 *Geo.* 1. which enacts, that, in that caſe, they ſhall have a right to be admitted without *paying a fine*. The right they ſtate, therefore, is a right under this act of parliament; and not by virtue of an election. The two iſſues joined on theſe pleas is, that they are *not elected*: At the ſame time, their true title is not denied: and yet judgment of *ouſter* is given againſt them. Whereas the iſſue joined being an immaterial iſſue, and not founded on any fact in the plea, the judgment ought to have been for them.

3*dly*, The judgment of the court below is *founded* on the *bill of exceptions*, of which they had no juriſdiction. *Davenport* verſus *Tyrrel*. *Trin.* 9 *Geo.* 3. *B. R.**. So that the judgment is on iſſues not diſputed; againſt titles admitted; and founded on what the court has no juriſdiction of.

* Since reported in 1 *Blackſt. Rep* 675.

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Laſtly. On the bill of exceptions itſelf, *four* different queſtions ariſe. 1*ſt*, Whether the perſons whoſe votes were rejected at the elections of the defendants were even voters *de facto*, at the time of the election. 2*dly*, Whether the evidence given by the proſecutor to prove them members *de facto*, was proper and admiſſible for that purpoſe. 3*dly*, Whether if they were not freemen *de jure*, though they might be freemen *de facto*, it was not competent to the defendants, under the circumſtances of this caſe, to prove at the trial that they were not ſo *de jure*. The 4*th* queſtion is, if it were competent for them to do ſo, whether the evidence offered was proper and ſufficient for that purpoſe.—As to the 1*ſt* queſtion upon the face of the entry produced by the proſecutor to prove their admiſſion, it appears that none of them were *actually* admitted, but only that there was an order they *ſhould be admitted*. That is not an admiſſion in any ſenſe; and ſo it was held in *Rex* verſus *Liſle, Andrews*, 163. But it is infinitely ſtronger here, becauſe the order was not made by the *general aſſembly*, but by the *common council* only, who have no right to elect either freemen or free burgeſſes. Another reaſon againſt their being members *de facto* is, that they had been *removed* before the election of the defendants, and ſuch removal was then in force. The evidence given of their being reſtored was ſubſequent to the time of the election. The *mandamuſes* could have no effect till they were actually reſtored; and the very application for the *mandamuſes* is evidence of their being out of poſſeſſion. During the intermediate time, therefore, they could not be officers *de facto*. If disfranchiſed, it was no longer neceſſary to ſummon them to meetings of the corporation; though it ſhould afterwards appear they were illegally disfranchiſed. It was ſo decided in 10 *Mod.* 76 *. But leſs would do here; for if the court ſhould be of opinion, that while disfranchiſed, (unleſs rightful members,) they could not vote; the Judge did wrong in not receiving evidence to prove they were not *de jure* members.

* *Hil.* 10 *Ann.* Queen *v.* Sutton.

The *ſecond* queſtion is, Whether the entries in the corporation books of their being reſtored to the office of common councilmen were proper and admiſſible to prove them officers *de facto*. The entries of reſtoration were not voluntary acts of the corporation, but under the authority and compulſion of writs of *mandamus*. Therefore, the writs of *mandamus* themſelves ſhould have been produced, as being the beſt evidence: As in the caſe of inquiſitions taken under a commiſſion, the commiſſion as well as the inquiſition muſt be produced.

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As to the third queſtion. How far and in what caſes the right of the electors may be gone into on informations againſt the elected, as a *general* queſtion, has never been decided. That a *latent* objection cannot be gone into, has been ſettled; but the reaſon in that caſe is not applicable to the preſent. Here, there was no ſurpriſe on the proſecutor. Rejecting evidence of this ſort does not tend to keep matters quiet; for if bad votes muſt be admitted, it is only introducing the elected into the corporation, for the ſake of turning them out again. If the objection is notorious to the other party, it may be made; and here, the objection to the eleven voters in queſtion was a matter notorious to both parties: Therefore, their right might be gone into. Where the elector has been ouſted by *quo warranto*, though the defendant was no party to the ſuit, and may be a ſtranger to it, yet the judgment is evidence againſt him; becauſe of the public notoriety. Here, the objection to theſe eleven perſons, was the point on which both parties agree the election muſt be decided. Both, therefore, were equally apprized. If the legality of theſe voters could not be entered into on this information, a preſiding officer at an election can have no power of examining whether the votes are legal or not. But in all elections, particularly of members of parliament, the preſiding officer exerciſes his judgment whether a vote is good or bad. If the preſiding officer has no right to judge, there can be no action for a falſe return. Beſides, in this caſe, the evidence reſpecting the right, was begun by the proſecutor himſelf; by entries to ſhew they were qualified and rightful members. If ſo, the plaintiffs ſurely have an equal right to rebut that evidence, and to prove they were not qualified. If, in ſuch caſes, evidence of the right is not to be gone into, by delaying the trial of ſome informations, and puſhing on the trial of others, bad members might be eſtabliſhed and rightful ones ouſted. For inſtance, ſuppoſe three claſſes of voters elected in *Auguſt*, *September*, and *October*; the 1ſt not duly elected; the 2d not duly elected without the votes of the firſt; the laſt elected by a majority, excluding thoſe in *Auguſt*. On an information againſt the laſt, they muſt be ouſted becauſe they cannot diſqualify the 1ſt ſet. Then, on an information againſt the 2d ſet, they muſt be eſtabliſhed, and the proſecution fail, for the ſame reaſons; then on an information againſt the 1ſt ſet, and they ouſted; the conſequence would be, that the 2d ſet, though not duly elected, would be eſtabliſhed, and the third ſet, though duly elected, would be ouſted.

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The remaining queſtion is, Whether the evidence offered was proper to prove that the perſons rejected were not common councilmen *de jure*. This depends on the ſtat. 4 *Geo.* 1. which is ſtill in force and the law of the place. It enacts, "that no perſon "ſhall be elected, who is not reſident a twelvemonth before." If ſo, there can be no doubt of the propriety of the evidence offered; for it was to prove they were not reſident a twelvemonth before.—Upon the whole, whether the iſſue of "not elected" be conſidered as an iſſue of fact only, or of fact blended with law, the plaintiffs in error are equally entitled. For if an iſſue of fact only, then ten were not members *de facto*, having been removed; and the proſecutor's evidence ought not to have been received. If the iſſue is blended with law, and it was competent to the proſecutor to go into the right, it was equally competent to the defendants to diſprove what was given in evidence by the proſecutor. If it be merely a queſtion of fact, we had a majority at the poll. If of law, the evidence of the title of the electors muſt be received. Therefore, in either caſe, the judge did wrong; and conſequently the judgment ſhould be reverſed.

Mr. *Davenport contra.* As to the *firſt* objection, that ſeveral perſons are included in one information; the ſtatute 19 *Geo.* 2. furniſhes a clear anſwer, by giving the court a diſcretion to join as many perſons as they pleaſe. And as to the objection that the leave of the court does not appear on the record, it never does appear; and there is no neceſſity it ſhould. *Secondly*, as to *ſeveral* claims being joined, it is ſaid, it would have been bad at common law: But the caſes quoted of ſeveral perſons joined in an indictment for perjury *, and for exerciſing a trade †, are not applicable. Six could hardly be guilty of the ſame perjury. But there is no caſe which ſays, one man ſhall not be called on, for uſurping different offices, in one information. The caſe in 2 *Barnardiſton* 25, ſays, "*two perſons* "cannot be joined in one indictment;" it don't ſay *ſeveral offences* cannot. But this act ſays, "by leave of the court *dif-* "*ferent uſurpations* may be joined." There is a caſe in *Rex* verſus *Clendon*, in 2 *Str.* 870. where it was ſaid, "two could not be "joined in an indictment for an aſſault:" But that has been often over-ruled. If there be no precedent, it muſt be reſolved on principles of law: And what principle of law ſays, the crown cannot call on a man to ſhew why he exerciſes ſeveral franchiſes? It is more beneficial for the defendant, that his different claims ſhould be joined, and one expence only be incurred. In *Co.*

* 2 *Str.* 921.
† 1 *Str.* 62. 3. 4 *Bur.* 2,546.

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Entries and *Raſtal*'s, there are ſeveral precedents of informations for uſurping different offices. *Co. Entries*, 527. tit. *quo warranto*, for uſurping *fourteen* different franchiſes. And in the Earl of *Shrewſbury*'s caſe, *Ibid. ſixteen* franchiſes are joined; and theſe in *quo warranto*, which is a ſtricter mode of proceeding than the information in *nature* of *quo warranto*, now ſubſtituted in its place. Theſe caſes occurred in the time of Lord *Coke*, and *Hobart* Attorney General. It might as well be ſaid, that goods ſold, and work and labour done ſhall not be joined. Therefore, the act of parliament is an anſwer to the firſt objection, and the principles of law to the ſecond.—The next objection goes to the *form* of the iſſue with reſpect to *Marſhall* and *Grubb*; who claim under the ſtatute 4 *Geo.* 1. as reſident traders. Now the right given by the ſtatute, is a claim to be *admitted*, provided they are reſident Proteſtant traders; but inſtead of ſhewing a title by *admiſſion* under the act, they waive that, and ſhew a title by *election*, preciſely in the ſame manner as the other defendants have done. Therefore, the replication taking iſſue on ſuch election is right.

Thirdly, As to the objection that the court have proceeded on the bill of exceptions of which they had no juriſdiction. If they had not, it is a mere *nullity*; and if the judgment be good independent of it, the court will conſider it as given on the verdict alone.

As to the fourth objection on the bill of exceptions, that the ten were not even voters *de facto*; 1ſt, becauſe not actually admitted, and 2dly, becauſe removed; if they were not *actually* admitted, the defendants themſelves never were; for the entry of their admiſſion is preciſely in the ſame manner. As to their being removed, that of itſelf is an admiſſion they were once burgeſſes: But by whom is the removal? By the common council *only* who are but a *part* of the body; conſequently, had no right to remove them. With regard to the admiſſibility of the proſecutor's evidence to prove them voters *de facto*; if the defendants had a right to produce the entry they did, to diſprove their right by ſhewing their amotion, it was clearly competent to the crown to ſhew they were reſtored by an entry in the ſame book, without producing the writs of *mandamus* themſelves. Written evidence muſt be all taken together; therefore the evidence was clearly admiſſible; and if ſo, the act of reſtoration, by relation back, makes them in from 1761, and puts them in the ſame ſituation as if they had never been out of poſſeſſion.—As to the 3d *point*, it is dangerous to attack *derivative* titles, by an objection

jection to the *original* title. If the *electors* were *de facto* members they ought not to have been rejected on the ground of a defect at the time of their own election; nor could the question be gone into. There are but two ways of attacking the title of an elector *de facto*; the 1st is by information, which is the propereſt mode; becauſe the party beſt knows his own title. The other is by an iſſue introduced on the record, upon the title of the perſon whoſe right is meant to be queſtioned. A third way was attempted in the famous caſe of *Strode* verſus *Palmer*, *Lilies Ent.* 248. by *notice* on the record that particular votes would be objected to. But neither theſe ſteps have been taken in the preſent caſe. Even judgment of *ouſter* is not concluſive; for if by colluſion, it may be controverted. *Rex* verſus *Hebden*, *Andr.* 388—392. But where there is no judgment of *ouſter*, no act of removal apparently tortious will do. In other caſes, the court requires that notice ſhould be given of the fact meant to be inſiſted on. *Tuſton* verſus *Neviſon*, 2 *Ld. Raym.* 1,354.—As to the 4th objection, It was decided in *Comyns.* 243. *Auſtin* verſus *Oſborn*, that a man may have a right to vote though never admitted.

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Lord MANSFIELD.—There are three objections made to this judgment, independent of the ſubject matter of the bill of exceptions. The *firſt* is, that this is an information againſt *different* perſons; and againſt the *ſame* perſons for *different uſurpations*. As to its being againſt the *ſame* perſons for *different* uſurpations, I think what Mr. *Davenport* has ſaid and the caſes he has cited are very ſtrong to ſhew, that the information would have been good at common law: But if it would not have been good at common law, it is ſtrongly within the ſtatute 19 *Geo.* 2. *c.* 12. *ſect.* 4: *a fortiori*, when the ſtatute gives leave to exhibit one and the ſame information, if the court ſhall think fit, againſt *different* defendants for the *ſeveral* rights claimed or ſet up by them reſpectively. As to the other part of this objection, that this is an information againſt *different* perſons; the anſwer is, that the act of parliament gives a diſcretionary power to the court to grant one or more informations according to the nature and circumſtances of the caſe: And to ſuppoſe extravagant caſes, or that the court would be abſurd enough to join two franchiſes in different corporations, is to ſuppoſe a caſe that cannot exiſt. The legiſlature truſts the court with the diſcretion of joining them; and upon an application for leave, the court goes into the nature of the queſtion to be tried. In this caſe, nothing could be more proper than to join the ſeveral defendants and the reſpective

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franchiſes they claim, which are three. The right of election is exactly the ſame, the queſtion is the ſame, and the evidence the ſame. But then it is contended, that ſuppoſing this *ſubſtantially right*, it is *formally wrong*; becauſe it is not ſtated to be filed againſt the ſeveral perſons and for the ſeveral offices they claim, by *leave of the court*. No ſuch thing is neceſſary; no information ever ſtates it to have been filed by leave of the court. The court gives the order and the information is filed. But ſuch leave never appears on the record. Counſel cannot ſign an information without leave is firſt given: But it never appears on the pleadings; therefore, that objection is out of the caſe.

The next objection independent of the bill of exceptions is, that *Marſhall* and *Grubb* claim to be freemen under the *act* of parliament and not by *election*, and therefore, the iſſue as to them is an immaterial iſſue, being joined on the *election*. The anſwer to that is, the defendants themſelves have put it ſo; and call their admiſſion by the corporation, an election. They are not freemen *ipſo facto*, by the act of parliament; but they muſt ſhew they are ſo, by proving themſelves Proteſtants, reſident in the town of *Galway* for a year antecedent to their being admitted, and that they have taken the oaths preſcribed. Therefore the defendants themſelves have led the proſecutor into the miſtake, if any, by calling their admiſſion an election. That objection therefore has no weight.

The next objection is, that the court below have given judgment not only on the verdict and what ariſes out of it, but have likewiſe gone into arguments on the bill of exceptions; and the judge before whom it was tried appeared perſonally and brought his bill of exceptions before the court of *B. R.* in *Ireland*. It certainly is ſo: The court has proceeded by miſtake on the bill of exceptions, and gone into arguments upon it. Till very lately there was no bill of exceptions in *Ireland*, and they were at a loſs in this caſe how to proceed. The ſtatute giving the bill of exceptions, ſays, it ſhall be brought by the judge who tried the cauſe into the ſuperior court. It is ſo here: A bill of exceptions from the *C. B.* comes into this court immediately: It goes from hence originally to the Lords in parliament. Where there is a bill of exceptions from the *B. R.* in *Ireland* the judge muſt bring it into this court. To eaſe him from that trouble in this caſe, a commiſſion iſſued to Lord *Annaly* to take the acknowledgment of his hand and ſeal. They were doubtful whether they ſhould not certify the tranſcript, as they do of all other records.

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But if the court of *B. R.* in *Ireland* had no juriſdiction upon the bill of exceptions, What is the conſequence? They have proceeded on good and bad grounds. Though this court differs from them on the bad ground, it does not follow that they differ from them on the good. If there is a good ground independent of the bill of exceptions, that is ſufficient. This court cannot reverſe a right judgment, becauſe the court in *Ireland* has proceeded erroneouſly in reſpect of ſomething elſe which they ought not to have entered into.

Then we come to the merits of the ſubject matter of the bill of exceptions; and as to that, *four* queſtions have been made.

The firſt queſtion is, Whether the ten voters who offered their votes, and were rejected, ought to have been received. Upon this queſtion the validity of the defendant's election entirely depends.

The 1*ſt* objection that has been made againſt their right to be received, is, that they were not even voters *de facto*. This objection has been attempted to be ſupported on two grounds: 1*ſt*. becauſe they were never admitted of the corporation, the order produced in evidence being only that they *ſhould* be admitted, and does not ſay they *were* admitted. But on the proceedings produced it appears, that for ten years they acted as burgeſſes; and *that* which was called an order of diſfranchiſement, conſiders them as burgeſſes. So the order for their reſtoration is evidence to be left to the jury of their having been admitted; even ſuppoſing it reſted on ſo nice a point, as whether it was made before or after their admiſſion.

The next ground is, that they had been *diſfranchiſed*; that the diſfranchiſement was ſtill in force, and their reſtoration not till *after* the election. As to this objection a great deal depends upon the uſe of the word *diſfranchiſement*; otherwiſe it creates a confuſion. But on looking into it, this is no diſfranchiſement, nor is there a pretence for calling it ſo: But it is doing that which the common council had not the ſemblance of a right to do; taking upon themſelves to judge of the validity of an election ten years before, and to declare it *null* and *void* for want of a qualification at that time. The word "diſfranchiſement" ſignifies taking a franchiſe from a man for ſome reaſonable cauſe; which they do not do, but only ſay they never were common councilmen. What authority have the common council to do that? None. It could be done only by information in the nature of a *quo warranto*. But ſuppoſe it had been a diſfranchiſement; how does it appear to the court that the com-

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mon council have a right to disfranchiſe? It is incident to the corporation at large to disfranchiſe, but not to a ſelect body. It does not follow that the ſelect body who has a right to elect has from thence a right to disfranchiſe. But the fact is, it is no disfranchiſement at all.

The next objection is, that the *order of reſtoration*, as it appears by the corporation books, was not made till *after* the election, and that this order alone is *not* the *beſt evidence*. As to that, the corporation books are clearly as good evidence to ſhew theſe perſons were reſtored, as to ſhew they were disfranchiſed. It ſtruck me at firſt, that the time of the reſtoration, and conſequently the time of iſſuing the *mandamus*, which was not proved, might be material: That is; if the *mandamus* to reſtore the voters in queſtion was *before* the *election* of the defendants, and the order *actually* reſtoring them, was not till *after*; and to ſupport their right, it had been neceſſary to make the order *relate back* to the *date* of the *mandamus*, the time of the writ iſſuing ſhould have been ſhewn. But upon conſideration, I think, that let the reſtoration come when it will, it *relates* to the *original right*. It would be ſo in the caſe of a probable ground of disfranchiſement. But here, there is not a probable ground: There is no colour for a removal; the act of common council was a mere nullity, and the reſtoration makes them in from the beginning. —Thus it ſtands as to their being voters *de facto*.

The next queſtion is, being voters *de facto*, whether, on the trial of the reſpective rights of the ſeveral defendants, the elected, the rights of the voters to their corporate franchiſe can be gone into, without any notice either on the record or collaterally? It is true, that, in general, the perſon elected muſt take upon himſelf to ſupport the right and title of his electors: It is ſo in a variety of caſes. In the election of aldermen of the city of *London*, coroners, members of parliament, *&c.* All theſe are bound to ſupport the rights of their electors. But, for the ſake of juſtice and convenience, a diſtinction has been made in caſes where the right of election depends upon corporate franchiſes. There are qualifications to the exception, ſuch as have been ſtated by Mr. *Buller*. The general queſtion has never been fully ſettled, though it has been touched upon in many caſes. But this is ſettled; that no corporator is bound by ſurpriſe to go into the original qualification of any corporator in poſſeſſion, who voted for him at his election; eſpecially without notice. What would

be the condition of theſe people? There are ten of them who for ten years have been quietly in poſſeſſion without any information, or the idea of an information being brought againſt them. How can the queſtion be gone into with regard to their qualification at ſuch a diſtance of time; more particularly as that qualification depends on their reſidence and inhabitancy for a year previous to the time of their election. 1776. SYMMERS *verſus* REGEM.

ASTON Juſtice.—This has not the leaſt appearance of a diſfranchiſement. Can a common councilman declare the election of another common councilman null and void? In general a diſfranchiſement muſt be the act of the whole body: And if a ſpecial power be delegated to a part of the body, it ought to be ſhewn. But no ſuch power appears in the common council. Therefore I look upon their order in this reſpect as a mere nullity. As to the qualification of the electors, it is not neceſſary at preſent to decide whether their right could have been gone into; becauſe, if the mayor was bound to receive theſe votes, the election is clearly bad. As to the ſtat. 4 *Geo.* 1. that ſtatute gives a man only a *right* to the freedom of the town; and to complete his title, he muſt go before the mayor, take the oaths and produce the other proofs required. The iſſue follows the words of the plea. Therefore I am at preſent ſatisfied, that the judgment entered is the proper judgment to be entered up on the verdict; and the circumſtance of the court below having proceeded upon the bill of exceptions, ſhall not vitiate it.

WILLES Juſtice—My only doubt is as to *Marſhall* and *Grubb*; for their right to be admitted freemen, is different from the others: and if they have performed the requiſites of the ſtat. 4th *Geo.* 1. they are entitled to be admitted, and are by the act declared to be free. Whether the ten are good voters or not, as at preſent adviſed, I think *Grubb* and *Marſhall* are good burgeſſes under the ſtatute.

ASHHURST Juſtice.—I entirely concur that if enough appears upon the whole of the record to ſhew that the court of *B. R.* in *Ireland* have given a right judgment, we ought not to reverſe it: And I think the bill of exceptions makes no difference. The iſſue is taken in the ſame words as the plea, and the plea calls it an election.

Lord MANSFIELD.—We will think of it as to this point and give you our opinion; and if any thing more is neceſſary, we will let you know it.

Cur. adviſare vult.

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The court afterwards ſaid, they wiſhed this caſe to be argued again. Accordingly it was argued again in *Hilary* Term 1777, by Mr. *Dunning* for the plaintiffs in error, and by Mr. *Mansfield* for the crown: But all the points were given up except two. 1ſt, Whether at all events the defendants *Grubb* and *Marſhall* were not entitled to judgment, their title under the *Galway* act not being denied or put in iſſue? 2dly, Whether the judge below did not do wrong in rejecting the evidence offered, to ſhew that the perſons rejected by the returning officer had not a right to vote?—After the argument, the court delivered their opinions, as follow:

Lord MANSFIELD.—There are two queſtions, *Firſt*, Whether, upon this record, judgment ought not to be given for the defendants *Grubb* and *Marſhall*? And, *Secondly*, Whether the judge below ought not to have gone into the ſeveral qualifications of the ſeveral voters, who voted as common councilmen, and whoſe titles he refuſed to enter into?

As to the firſt queſtion, enough appears upon the record to incline us to think, that *Grubb* and *Marſhall* really had a right to be freemen, if they had pleaded in a proper way: And if judgment of *ouſter* on this record were to bar them for ever of the benefit of that right, a reluctance would ariſe in the court, from the general prejudice they have againſt any party loſing his right, by a mere defect in his form of pleading. If that were the caſe, another principle muſt be adhered to, which is, that in all queſtions concerning the rights of corporations, it is moſt deſirable and neceſſary, that the law ſhould be certain, not only in reſpect of the matter, but alſo in reſpect of the form and manner of all their proceedings.

But my mind with regard to *Marſhall* and *Grubb* is conſiderably eaſed, by being of opinion, that the judgment of *ouſter* on this record will not bar them, if they apply in a proper way: Becauſe they will then have a new title, not affected by the preſent judgment. It may happen, that perſons might apply at one time under the act of parliament, when they had no title; and at the end of ſix months after they might have a very good one. If it ſhould be ſo in reſpect of theſe two defendants, the queſtion is ſtill open.

This caſe, as it is now brought before the court, is an information againſt the two defendants, to ſhew by what authority they claim the offices of freemen, free burgeſſes, and common councilmen of the town and borough of *Galway*. As to the offices of *common councilmen* and *free burgeſſes*, the qualification and

mode of election depends entirely upon the *conſtitution of the borough*. As to the office of *freemen*, there are *two* modes of acquiring that right: The one, according to the conſtitution of the borough, by the election of the mayor, common council, and freemen in general aſſembly, agreeable to the rules of the borough and its charter: The other, by ſpecial act of parliament, which conſiſts and is complicated of many facts. This latter gives a *right* only, not a *title*; becauſe the qualifications of the claimants muſt be judged of. They are to be tradeſmen of certain trades mentioned: Inhabitants within the borough for a year preceding: Proteſtants profeſſed for ſeven years; and then they are to apply for their freedom. The act, therefore, gives but a *qualification*. The mode of obtaining their freedom is by application to the mayor upon the facts before mentioned. The mayor therefore, *ex officio*, is to judge whether they are qualified within the act or not; if they are, he muſt admit them; if not, he ſhould reject them; and if he ſwears any one in without a qualification, ſuch perſon may be *ouſted* by an information. 1776. SYMMERS *verſus* REGEM.

But theſe two modes of acquiring the freedom of this corporation are attended with different conſequences. The freemen elected according to the conſtitution of the borough remain in poſſeſſion of their franchiſe *for life*: Thoſe admitted under the act of parliament continue ſo only during their actual *reſidence* in the town. It is neceſſary, therefore, to know, which are choſen the one way, and which the other.

To the preſent information, in nature of *quo warranto*, the two defendants have pleaded the *qualification* under the *act* of parliament. They certainly have pleaded that they deſired to be ſworn under the act of parliament: But then they join the title of common councilmen and the office of freemen in the ſame right, and they apply exactly the ſame words to each. They aver, that they were firſt propoſed by the common council, purſuant to the new rules for regulating the town of *Galway* ſtated in the plea, which require that they ſhould be firſt approved of by the common council, and propounded to be elected at the *Tholſell*. But that is not neceſſary under the act of parliament, 4 *Geo.* 1. Then they ſtate that they were *duly elected*, and that being *ſo elected* into the office of freemen, free burgeſſes and common councilmen reſpectively, they took the oaths before the *mayor* and *two burgeſſes*; which is the form in caſes of election by the *conſtitution* of the borough. Here, therefore, they plainly reſt their title on *election*, and go to iſſue on that title.

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Upon this record it does not appear that they took any ſtep to be made freemen by the act of parliament; therefore, they have not ſhewn a complete title under the act of parliament: But reſt their claim upon another title, upon which they have gone to iſſue, and which has been found againſt them. It is impoſſible, therefore, to give judgment for them.

The next, which is an objection of leſs difficulty, is, that the judge below has refuſed to go into the qualification and capacity of ſeveral freemen and common councilmen who offered their votes. Let us ſtate the objection as it is put, and examine it. The propoſition is, that the judge, on this information, ſhould have done exactly what he ought to have done, if the title of theſe perſons, who were common councilmen *de facto*, had actually been in queſtion before him upon *quo warranto*. They were *de facto* members of the corporation, admitted, ſworn, and in the actual enjoyment of the office. The queſtion is, Whether the judge *collaterally* at the trial ought to have gone into the validity of theſe men's titles? Could the mayor have gone into it at the election? I am very clear he could not. There are modes ſufficient open to the partiality of returning officers, without adding more. Where the qualification is to be judged of by him, it cannot be avoided. In caſes of elections in the city of *London*, certain qualifications are required at the poll: Therefore it muſt be ſeen that in ſome degree the candidates have that qualification. So where an election is to be tried which may involve many other rights. But where the right of election is in freemen in their corporate deſcription; whether they were duly choſen or not, is not to be tried at the election of a third perſon; but they muſt be properly *ouſted*. What? After a poſſeſſion of twelve years, ſhall their right be called in queſtion and tried on an information againſt other perſons who are propoſed to be freemen? It is impoſſible to be done. Suppoſe the right depended upon their being ſworn in before twelve burgeſſes: Is the right of thoſe twelve to be tried in an information againſt one? But the objection would go further; for there are corporations where there are thouſands of freemen. Upon the trial of a right of a freeman's election made by them, is the court to go into the qualifications of all the thouſands to have been made freemen at the time they were elected? Certainly not. For this purpoſe they are to be conſidered as having a right. It is ſtronger too in the preſent caſe, becauſe theſe were reſtored upon a *mandamus*, though I do not go upon that. It is all one objection.

It

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It would be to lay down a rule, that a party upon every new election ſhall be at liberty to go into the corporate rights of all the members *de facto;* which is a propoſition that was never before heard of. Therefore I think the judge did right in refuſing evidence to impeach their titles.

Suppoſe a corporate body conſiſting of twenty four were to add ten to their number. That would be an abſolute nullity; becauſe they never were corporators *de facto.* But the preſent queſtion is, Whether in a *quo warranto* againſt particular members, you can go into the title of other corporators *de facto?* and I am clearly of opinion you cannot.

ASTON, Juſtice.—Upon the ſecond queſtion I am very clearly of the ſame opinion. The *Carmarthen* caſe is in point.

The more material queſtion is the firſt queſtion, whether upon this record, there is ſufficient to diſtinguiſh the caſe of *Grubb* and *Marſhall* from the others? It does appear that perhaps *Grubb* and *Marſhall* may have been very well entitled under the ſtatute 4 *Geo.* 1. to have demanded their freedom. But I cannot conceive a caſe, where a man has a right under a charter or ſtatute by claiming it of the proper perſon, that, if refuſed upon that claim, and that claim only appearing on the record, it would be a good and complete right without a real admiſſion. Upon the whole of the record, I think that *Grubb* and *Marſhall* have put their defence upon their election, and ſtand on the ſame title as the reſt. They have pleaded the uſage of the borough in relation to the election. They then ſtate the new rules of *Ireland* relating to this town of *Galway;* that nothing ſhall be done by the *tholſell* till it has paſſed the common council. Then they ſtate the oath to be adminiſtered; their reſidence, their being Proteſtants; their offer to take the oaths, and the demand of their freedom purſuant to the act. But ſaying ſo, does not make it in purſuance of the act,

Then the ſtate that a *tholſell* was held, and that *Grubb* and *Marſhall* were propounded to be admitted; and were in due manner *elected* in conſequence. They plead therefore juſt as the reſt do. They join with the reſt at leaſt in ſaying they were *elected,* and that they took the *oaths* agreeable to *the charter.* Upon this plea, therefore, this was not a demand of their freedom in conſequence of the qualification under the act; but they have pleaded that they were elected as other perſons, without the act. The iſſue purſues the plea, that they were not elected; and I am clearly ſatisfied that this was a proper and not an immaterial iſſue.

Willes

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WILLES Juſtice.—I am clearly of the ſame opinion on the 1ſt point, but not on the 2d; with reſpect to which the doubts I before entertained are not ſatisfied.—There is a confuſion upon the record whether freemen and free burgeſſes are not the ſame. But certainly the common councilman was a different perſon, and is not included in the act of parliament. The firſt right is by election, according to the cuſtom of the borough, and where a man is *elected*, he is in for life, unleſs he commits a forfeiture of his franchiſe. But the act of parliament declares the freedom ſhall continue only during reſidence. As it ſtands on the record, I cannot agree with my brother *Aſton* that the plea of all the defendants is alike. For *Grubb* and *Marſhall* have pleaded a title under the act of parliament. The others do not. The queſtion therefore is, Whether there is enough ſtated in the plea to ſhew they are entitled under the act of parliament, and have done enough to acquire their freedom? If there is enough to ſhew that, and the iſſue is joined on the election, it is an immaterial iſſue.

Now they firſt ſtate the qualifications; next the act of parliament: What is the other requiſite for them to do? They are to demand their freedom purſuant to the act. Does the plea go to it? The words are, "that they offered to take the oaths purſuant "to the act of parliament." This was previous to any claim they had by election. But then they confound the two rights, by ſaying they *elected* and *admitted* them: As if the one term applied to one right, and the other to the other. They add that they have taken the oaths before the *mayor* and *two* of the *burgeſſes*; but joining the *burgeſſes* was not a neceſſary circumſtance upon taking the oaths on admiſſion: If they took them before the mayor, they had a right under the act of parliament. I do not therefore think the judgment of *ouſter* ſhould paſs againſt them. There is a ſtrong caſe in *Strange* 625. *Rex* verſus *Hearle*, which makes me alſo in doubt, whether the judgment of *ouſter* on this record will not bar the defendants' title under the act, even if they ſhould apply in a proper way; unleſs they can ſhew a new *ſubſequent* acquired right.

ASHHURST, Juſtice.—I had a doubt about a repleader upon the firſt title: But the joining iſſue upon the election makes the title under the act of parliament unneceſſary. For if they had meant to have relied on that, they would have demurred to the replication.

Further,

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SYMMERS *verſus* RACKET.

Further, upon theſe pleadings, the title they have ſet forth in the plea under the act of parliament, is not complete; becauſe the qualification of being a Proteſtant, *&c.* is not a complete, but an inchoate title; which they had a right to have rendered complete, by taking the proper ſteps before the mayor. Have they taken thoſe ſteps? If they meant to be admitted under the act, they ſhould have given notice of ſuch their intention. But it does not appear that they applied to the mayor to be admitted under the act. The contrary rather appears: For the admiſſion ſet out is, an admiſſion by the *mayor* and *common council*; which was an admiſſion *under the charter*; and not under the act of parliament. Therefore, if there is not a complete title under the act of parliament, judgment of *ouſter* muſt go againſt them.

Beſides, the court will not grant a repleader, but where complete juſtice may be anſwered. If a repleader were to be granted, the parties muſt begin from the point of pleading where the immateriality begins: The defendants ſay, it is in the replication. I think the iſſue taken on the replication is not an immaterial iſſue. What would be the conſequence of granting a repleader? The relator might reply *de novo*. He might in that caſe demur; it would be doing nothing more therefore than putting him to demur for the duplicity of the plea, and the ends of juſtice would not be anſwered. If judgment of *ouſter* is given on this right, it will not make the other title of the defendants bad. Therefore I think the judgment ought to be againſt them.

On the ſecond point I concur, that the diſqualification of voters for non-reſidence ought not to have been gone into at the time of election. If upon ſuch a general iſſue as *non fuit electus*, it could be done, it would be the cauſe of endleſs prolixity.

Judgment affirmed.

PETYT *verſus* BERKELEY, Eſq.

Thurſday, Nov. 28th.

MR. *Bearcroft* ſhewed cauſe againſt a rule *niſi*, for ſetting aſide a rule obtained by the defendant for changing the *venue* from *Middleſex* to *Glouceſterſhire*.

Aſton, Juſtice, abſent.

The court will *not* change the *venue* where an impartial or *ſatisfactory* trial cannot be had.—It is *too late* to change the *venue* after an order for time to plead, pleading iſſuably, where the terms are to take ſhort notice of trial at the *firſt* ſittings in *London* or *Middleſex*

The action was an action of ſcandal brought by a *Glouceſterſhire* juſtice of peace, for words ſpoken by the defendant Mr. *Berkeley* upon the huſtings, at the time of the election of a mem-

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PETYT *verſus* BERKLEY.

ber for the county of *Glouceſter*; Mr. *Berkeley* himſelf being then one of the candidates. The defendant had obtained a rule, upon the common affidavit, "to change the *venue* from *Middleſex* to *Glouceſterſhire* where the cauſe of action aroſe." Mr. Serjeant *Wilſon* afterwards moved to ſet this laſt rule aſide; and obtained the preſent rule, againſt which Mr. *Bearcroft* now ſhewed cauſe; inſiſting that it was never too late to remove the cauſe till after plea pleaded.

Mr. Serjeant *Wilſon* in ſupport of the preſent rule alleged, 1ſt. That the whole county of *Glouceſter* was ſo agitated at this election, on the one ſide or the other, that it was impoſſible, at leaſt highly improbable, a jury of that county would try the cauſe impartially and without prejudice. 2dly, He objected that the defendant was too late in his application to change the *venue* from *Middleſex* to *Glouceſterſhire*, in as much as he had previouſly applied for and obtained an order for time to plead; upon the terms of pleading iſſuably, rejoining gratis, and taking ſhort notice of trial for the firſt ſittings in *Middleſex*: And cited a caſe of *Burgeſs* v. *Carter*, in *C. B.* determined a few days ago, (on the 22d inſtant,) where the court upon the application of Serjeant *Kemp*, diſcharged a rule to change the *venue*; the defendant having (as in this caſe) obtained an order for leave to plead, pleading iſſuably, and taking ſhort notice of trial.

Lord MANSFIELD.—Either ground is ſufficient. 1ſt, The diſtinction taken is this. The *venue* may be changed after an order for time to plead, though upon the terms of pleading iſſuably; but not after an order for time to plead, where the terms are to plead iſſuably and take ſhort notice of trial at the firſt ſittings in *London* or *Middleſex*, becauſe there a trial would be loſt *. But ſecondly, Suppoſing that out of the queſtion, the other is a very ſtrong ground why the *venue* ſhould not be changed in this caſe. In all caſes one would wiſh not only a fair, but an unſuſpected trial. Here, the very nature of the action, the event which gave riſe to it, and the circumſtances of the parties ſhew, there cannot be a ſatisfactory trial. Of all trials the greateſt latitude for bias is open in an action for words occaſioned by election heat. A man may very ſafely ſwear there cannot be a fair trial upon haſty words, uttered at the time of the poll. The maſter when he takes up the freeholders' book, muſt pitch on men who are friends of the one ſide or the other. Therefore I

* *Vide* Hunter v. Gray, *Trin.* 28 *Geo.* 2: *C. B. Barnes*, (quarto edition) 493. *S. P.* —1 *Wilſ.* 245. Whiteman v. Thomſon, *contra.*

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think upon either ground the rule for discharging the rule obtained by the defendant should be made absolute. 1776.

The other judges concurred. Rule absolute.

PETYT *versus* BARKELEY.

REX *versus* JOHN TUBBS.

Same day.

THE Recorder of *London* (Mr. Serjeant *Glynn*) having obtained a rule *nisi* for a *habeas corpus* to bring up the body of one *John Tubbs*, an impressed sailor; Mr. Attorney General *Thurlow*, Mr. Solicitor General *Wedderburne*, Mr. *Wallace*, and Mr. *Cust* now shewed cause. The facts upon the affidavits appeared to be as follow:

Lieutenant *Tait*, being empowered by warrant from the admiralty in the usual form, "to impress seamen, sea-faring men, "and persons whose occupations and callings were to work in "vessels and boats upon rivers," pressed the defendant *Tubbs* a waterman, at that time *employed* in *navigating a ship* in the river *Thames*, below *Gravesend*. Upon which, *Tubbs* produced and shewed him the following certificate; "These are to certify to "whom, &c. that *John Tubbs* is duly admitted a *waterman of* "*the city of London*, to attend upon the lord mayor and alder- "men of the said city, *when* and *as often as he shall be required*; "of which *all persons, empowered to impress* men into his Ma- "jesty's service, *are desired to take notice*; for that by such "admission *he is exempted* from being impressed, or compelled "to such service. Signed *W. Dawson* water-bailiff."—The lieutenant, notwithstanding this certificate, took *Tubbs* and sent him on board the *Conqueſtadore*, a guardship lying at the *Nore*. In suport of the motion, *Dawson* the city water-bailiff made affidavit, "that there were *thirty-one* watermen belonging to the "lord mayor, whose duty it was to attend the lord mayor when "required, as mentioned in their certificate; and that *Tubbs* "was one."—One *Hill* made affidavit, "that the duty of the "city watermen was, to attend the lord mayor on the river to "courts of conservancy, and on other occasions when the duty "of his office called him on the river." *Four* instances were produced, taken from the city books, of watermen having been discharged who had been impressed, *viz. Thomas Kemp* in 1761. *Thomas Walker* and *Henry Cutter* in 1746 or 1747, and *Richard Underhill* in 1745. And affidavits were made by several of the city watermen, setting forth "that they had always heard and "been

The power of IMPRESSING *seamen, sea-faring men*, and persons whose *occupations* and callings are to *work* in *vessels* and *boats upon rivers*, is founded upon *immemorial usages*. And there may be a legal right of *exemption* upon the *same foundation*.—What facts will not amount to proofs of such exemption.

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" been informed that the certificate of their being ſuch, had " always been conſidered as a ſufficient protection againſt their " being impreſſed."

On the other hand Mr. *Stevens*, the ſecretary of the admiralty, made affidavit, " that during *fifteen* years that he had " ſerved in the admiralty office, the *uſage* had always been to " give inſtructions to officers employed in the impreſs ſervice, " reſtraining them from preſſing perſons of particular denomi- " nations and deſcriptions; but that to the beſt of his know- " ledge and belief, no officer was ever enjoined by ſuch inſtruc- " tions *from preſſing the watermen of the lord mayor of London*, " nor were they exempt on that account from being impreſſed." *Thomas Fearne*, one of the clerks of the admiralty-office, made affidavit, " that he had ſearched the book of entries containing " all the orders for the diſcharge of perſons impreſſed; but that " of the *four* perſons named in the affidavits in ſupport of the " rule, he could only find the entry of the diſcharge of *Rich-* " *ard Underhill*, which was as follows." " To Sir *Robert Wil-* " *mot*." " Sir, I have laid before the lords commiſſioners of the " admiralty, your letter of this day's date, *requeſting* the diſcharge " of *Richard Underhill*, one of the watermen belonging to the " lord mayor; and in anſwer thereto, am commanded to ac- " quaint you, that he *offered an able ſeaman to ſerve in his room*; " but *in regard to your application* in his behalf, they have or- " dered him to be diſcharged *without that expence*. *Auguſt* 9th, " 1744."

It was contended againſt the rule on two grounds. 1*ſt*, That it was a matter of great doubt, whether if this exemption could be ſupported at all, it could be founded on any leſs authority than an act of parliament. 2*dly*, If it could be warranted by uſage or preſcription, whether there was ſufficient evidence to ſupport the uſage in this caſe. Upon the *firſt* ground it was obſerved, that the exemption, in the extent in which it was claimed, was a general, permanent, perpetual, unqualified exemption, without reference to any circumſtances of public exigence or emergency whatſoever. That by firſt principles of law, every man was bound to ſerve in defence of the ſtate. It was true that, in reſpect of this particular duty, uſage had confined the obligation to ſea-faring men, whoſe habits of life had rendered them fitter and better qualified for the ſervice. It was however equally true, that when from particular circumſtances, or from principles of policy, it had been thought neceſſary to create exemptions of this deſcription of perſons, applications had been

been regularly made to parliament for the purpoſe; as was evident from the ſtat. 1 *An. ſt.* 1. *c.* 16. *ſect.* 2. Stat. 6 *Ann.* *c.* 31. *ſect.* 2. Stat. 13 *Geo.* 2. *c.* 17. *ſect.* 1, 2, 3.—*c.* 28. *ſect.* 5. Stat. 19 *Geo.* 2. *c.* 30. *ſect.* 1. That theſe ſtatutes alone afforded the ſtrongeſt inference that no power, leſs than the authority of parliament itſelf, could grant ſuch an exemption. That the preſent claim clearly was not founded on any act of parliament; therefore, ſuppoſing there could be any other legal exemption, *uſage* or a *charter* were the only ground upon which it could be founded. As to the *latter*, it was an eſtabliſhed rule of the law of *England*, that the King cannot grant an exemption from any duties but thoſe he has a title to impoſe, and which are *perſonal to him*, and diſtinct from the general intereſt of the realm. 2 *Rol. Abr.* 198. letter K. *pl.* 1. *Ibid.* 202. letter T. *pl.* 2. line 15.—8 *Mod.* 21. That in the laſt caſe, though no judgment was given, the opinion thrown out by Lord Chief Juſtice *Parker*, was in point to the preſent objection. The queſtion there was, Whether the King by his charter could exempt the College of Phyſicians from *ſerving in the militia?* Lord Chief Juſtice *Parker* ſaid, "the better opinion ſeemed to be, "that the militia being for the defence of the realm, the King "could not grant a charter of exemption." A *fortiori*, therefore, the prerogative of the crown could not exempt from this ſervice, which was ſtill more eſſentially neceſſary for the defence and protection of the ſtate.

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Secondly, as to *uſage* or preſcription, if it could be a foundation for the claim, it ought at leaſt to be ſet out with ſuch certainty and preciſion, as to leave no doubt in the minds of the court that it was well and ſufficiently grounded. That the exemption itſelf ought to be qualified, and guarded by ſuch checks and reſtrictions as not to ſtand in the way of any public emergency, or to impede the ſervice in general, by leaving it open to abuſe and impoſition; and above all, the *exemption* ought to be *public*, *evident*, and *notorious*. That where parliament had granted exemptions, ſpecial care had been taken to provide *regiſters* of thoſe perſons who were exempted; and if employed in other ſituations, the protection ceaſed. But here, the only memorial of retainer in the ſervice of the Lord Mayor was the *certificate* itſelf, *in the cuſtody of the party*; without any entry, minute, or public regiſter which the Admiralty might have recourſe to, to ſatisfy themſelves that ſuch certificate had been granted; or that no more than thirty-one had been iſſued. Without any badge, livery, or ſalary annexed to the employ-

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employment, to distinguish them from any other waterman or sea-faring person: And consequently, no check to prevent the certificate being passed from hand to hand, or from abuses being practised, to the ruin and obstruction of the service. That as to the custom itself, the affidavits went no further than *information* and *belief* that the certificates had been considered as a protection, without a suggestion, much less a positive averment, that they had been respected as such, by any officers employed on the impress service. As to the instances of persons discharged, they were much too few to establish such a claim; more especially as they amounted neither to a demand or proof of a discharge *as of right*. On the contrary, one of them was clearly on a ground directly the reverse of a demand of right, being granted *through favour*; and after an offer by the party to find a substitute in his stead. Besides, the defendant in this case was actually in *another service* at the time he was impressed: Therefore no longer entitled to protection. In addition to these objections, it was remarkable, that the statute 2 & 3 *Philip & Mary. c.* 16. *sect.* 8. by which the watermen's company was erected, and by which it is made penal for any waterman to conceal himself in the time of an impress, takes no notice of the present exemption; though the jurisdiction in such cases is expressly given to the lord mayor and aldermen. Therefore, as there was no *positive averment* of the existence of the exemption; as the evidence, if there had been such averment, was too loose and insufficient to establish the claim; as the prerogative of the crown could not grant it, and as there was clearly no act of parliament to warrant it, they submitted there was no ground or foundation for the application; and therefore, that the rule for the *habeas corpus* ought to be discharged.

The recorder of *London*, Mr. *Dunning*, Mr. *Davenport*, Mr. *Alleyne*, and Mr. *Lee contra*, in support of the rule; stated the ground of the application to be, that the defendant being retained as the *known publick* officer of the chief magistrate of the city of *London*, to be attendant on his person in the execution of a public trust, was privileged from being taken out of that service by any power whatsoever. That this *exemption* was *founded* in *usage* and *utility*, and that they claimed it as a *matter of right*. As to the several objections, they answered, 1*st*, That the legality of pressing, if founded at all, could only be supported by immemorial usage; there being clearly no statute in force investing the crown with any such authority. If founded in immemorial

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memorial uſage, of conſequence, it might be *qualified* upon the ſame ground. Therefore, no act of parliament was neceſſary to warrant the exemption claimed. 2*dly*, Admitting it to be a prerogative right, it was, as in all other inſtances of the prerogative, ſo far under the controul of the crown, that it might be waved at the King's pleaſure. Conſequently, there might be an exemption by charter: And the queſtion in 8 *Mod.* 21. whether the crown by its prerogative could exempt from ſerving in the *militia*, did not at all apply; becauſe the militia is eſtabliſhed by act of parliament: Therefore the crown, independent of the legiſlature, could have no power to exempt.—Next, as to the objections made to the particular exemption claimed in this caſe, 1*ſt*, That the mode and fact of the *retainer* were not ſufficiently notorious, and therefore liable to abuſe; they anſwered, it was ſufficient if it appeared, as it did in this caſe, that the party was retained by the proper officer appointed for that purpoſe; that he was, in conſequence of ſuch retainer, obliged to attend the chief magiſtrate of the city, whenever called upon; and that the ſervice was ſuch as was indiſpenſably neceſſary in holding courts of conſervancy, and upon other occaſions where the duty of the lord mayor required his attendance on the river. As to the *ſuppoſed* abuſe, it ſhould have been *proved*, and not merely inferred in argument. In fact, the certificate was a much better check than any badge or livery, or other device; the very deſcription of the ſize and appearance of the party being inſerted in the margin. As to the ſervice being *occaſional* only, and not throughout the year, it was enough that they were liable to be called upon at any time the lord-mayor ſhould think fit: And though the defendant was not actually in the ſervice at the time he was impreſſed, he was within the *limits of the conſervancy*, and of courſe within the protection. If he had actually entered into another ſervice incompatible with his duty in this, the argument might hold. Laſtly, as to the evidence in ſupport of the claim, they ſaid, it was in proof on the part of the defendant, that this privilege had never been violated except in *three* or *four* inſtances; in each of which the party was diſcharged; that the certificate had been univerſally conſidered as a full and ſufficient protection; and on the other hand not a ſingle inſtance could be produced of a refuſal to diſcharge, or of a detainer in the ſervice againſt the will of the party, where any of them had accidentally been impreſſed. That there was no poſitive denial of the right, but only negatively, that the wit-

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neſſes knew of no ſuch exemption. Therefore, as it was moſt clear that the right itſelf might have a legal foundation in immemorial uſage; as the utility of ſuch an exemption was a reaſonable ground for the claim, and as from the nature of the evidence the exiſtence of it was beyond diſpute; having been univerſally ſubmitted to, ſeldom infringed, and when infringed recognized and eſtabliſhed by the parties having been conſtantly diſcharged; they prayed the rule might be made abſolute, and the writ awarded.

Lord MANSFIELD.—I am very ſorry that either of the reſpectable parties before the court, the city of *London* on the one hand, or the lords commiſſioners of the Admiralty on the other, have been prevailed upon to agitate this queſtion.

Of the utility of this man to the city of *London* or to the lord-mayor, no one can ſeriouſly ſpeak: A man retained to earn half a crown a day; without badge or livery, without any obligation upon him to attend; whoſe entrance into the ſervice of the lord-mayor is voluntary; and who if he chuſes to quit it for any other employment creates no inconvenience to any body, or a difficulty to ſupply his place! Notwithſtanding this, if the city of *London* has a privilege of protecting thirty-one perſons from being impreſſed, they have a right to inſiſt upon ſuch privilege. On the other hand, where is the immenſe utility to the public ſervice with regard to theſe thirty-one perſons, whether they are preſſed or not? It is impoſſible they can be an object. The utility, therefore, in the one caſe or the other, cannot be the ground of the preſent diſpute. But it muſt have ariſen upon this: The city would not aſk or take the exemption of this man as a *favour*; but inſiſt upon it as a *right*; and in a manner in which they never inſiſted upon it before. And the admiralty, jealous of new rights of exemption being ſet up, would not grant it as a *right*. The real queſtion between them is, whether there is a *legal right* of *exemption* or not?

I was in hopes the court would have had an opportunity of inveſtigating this point to the bottom, inſtead of being urged to diſcuſs it ſo inſtantaneouſly; and without any evidence with regard to the foundation of the claim. I own I wiſhed for a more deliberate conſideration upon the ſubject; but being prevented of that, I am bound to ſay what my preſent ſentiments are.

The power of preſſing is founded upon immemorial uſage, allowed for ages: If it be ſo founded and allowed for ages, it

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can have no ground to ſtand upon, nor can it be vindicated or juſtified by any reaſon but the ſafety of the ſtate: And the practice is deduced from that trite maxim of the conſtitutional law of *England*, "that private miſchief had better be ſubmitted to, than "that public detriment and inconvenience ſhould enſue." To be ſure, there are inſtances where private men muſt give way to the public good. In every caſe of preſſing, every man muſt be very ſorry for the act, and for the neceſſity which gives riſe to it. It ought, therefore, to be exerciſed with the greateſt moderation; and only upon the moſt cogent neceſſity. And though it be a legal power, it may like many others be abuſed in the exerciſe of it. A bailiff may execute legal proceſs in ſuch a manner as the court would commit him for: In like manner, the power of preſſing may be abuſed; as by preſſing the watermen of the lord-mayor whilſt they are in the act of rowing him in his barge. And many other inſtances might be put.

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Being founded in immemorial uſage, there can be no doubt but there may be an exception out of it, on the ſame foundation; upon immemorial uſage. I therefore lay out of the caſe all that has been ſaid about the neceſſity of an act of parliament to create an exemption; and likewiſe all that has been mentioned relative to the doubt ſtated of the power of the crown to exempt by charter. If it were at all neceſſary to go into that queſtion here, it might be ſufficient to obſerve, that all the rights of the city have been confirmed by act of parliament.—But what has been approved by immemorial uſage allowed for ages, is always ſuppoſed to have had a good beginning. Therefore, if the exception or exemption ſtands upon that ground, it is as good as the inſtitution itſelf.

The only queſtion, upon what appears before us, is, "Whether, "in fact, there is evidence of ſuch uſage as a matter of right?" I ſay, as a *matter of right*: For it is well known that many perſons have granted protections; many have given badges to watermen, and have claimed that they ſhould be exempt. Peers have done it; and queſtions in the Houſe of Lords have ariſen upon it. Members of the Houſe of Commons have retained watermen; and perhaps the lords of the Admiralty may have paid regard to applications made in behalf of ſuch men, and may have diſcharged them. So here, if the parties had cared to have made ſuch application, it might have been attended to and complied with. For, as a matter of *favour*, it is impoſſible to ſuppoſe the lords of the admiralty would have made a moment's heſita-

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tion or diſpute. But it is inſiſted on and claimed as a *matter of right.*

Let us ſee therefore, whether this is an eſtabliſhed exemption *of right.*

Every exemption throws the burthen the heavier on thoſe who are ſubject to bear it. Therefore, for their ſakes, as well as for the public ſervice, all exemptions ought to be examined and clearly ſet out. In the firſt place, it does not appear from any law book, it does not appear from any hiſtory, it has not been ſuggeſted at the bar, that there is, throughout the whole kingdom, any other exemption by the *common law.* When I ſpeak of exemption, I mean exemption out of the deſcription: For to ſuppoſe the uſage extends to private gentlemen amuſing themſelves with yachts, *&c.* is abſurd.

Perſons liable, muſt come purely *within the deſcription* of ſeamen, ſea-faring men, *&c.* He therefore, who is not within the deſcription, does not come within the uſage. The commiſſion is not to preſs landmen, or perſons of any other deſcription of life, but ſuch men as are deſcribed to be ſea-faring men, *&c.* Officers are not within the deſcription. It is a very ſtrong circumſtance, therefore, that there is in fact no other exemption ſtated or alluded to, which reſts upon the common law. There are many exemptions by ſtatute: But they are grounded upon conſiderations of public policy at the particular times of their being made; and upon the circumſtance of its being in fact better for the ſervice that the objects of thoſe acts ſhould be exempted, than that they ſhould be ſubject to be preſſed; as, apprentices, landmen entering voluntarily; fiſhermen; all foreigners; and in reſpect of theſe laſt mentioned, the reaſon is very obvious: For, during the time of a war, the act of navigation has been diſpenſed with, and two thirds of the crew of merchantmen have been allowed to be *foreigners.* Harpooners and others have been exempted. A line has been drawn with reſpect to the age: And many other inſtances might be put. But the exemption of thoſe called the watermen of the city of *London,* is to be found in no ſtatute or common law book whatſoever.

Let us ſee then, how the uſage ſtands, upon the evidence *now* before the court: A certificate from the water-bailiff is produced, the contents of which have been read; and in the affidavits, apprehenſions are ſtated of a reputed cuſtom that theſe thirty-one watermen are exempted from being impreſſed. *Four* inſtances, and

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no more, are produced, which arose at different times; and in respect of which this equivocal kind of fact is stated: that four persons were pressed, and that upon application from the lord-mayor to the admiralty, they were immediately, or soon after, discharged. But what the nature of the application was, whether *requested* as a matter of *favour*, or *demanded* as *of right*, is not stated. If requested as a matter of favour, it would have been very extraordinary for the lords of the Admiralty to have refused it. Here, the application is an application of right, by an order of court of the lord-mayor and aldermen. As to *three* of the instances produced, it is not ascertained what they were; nor is there any memorandum or mention made of them in the admiralty books. As to the *fourth*, the man had so little idea of a *legal right* to be *exempted*, that he offered to find another person to serve in his room: And this is the only instance where the court sees the *manner* of the application. On the other hand, very strong circumstances, as to what has been the usage, arise from the instructions which are given to the officers employed on the impress service; and which it would be unpardonable in the admiralty to omit. In these instructions, every *known* and established *legal* mode of exemption is expressly taken notice of and set out. In addition to this, it is sworn by Mr. *Stephens*, in his affidavit, "that there never was any instruc-"tion given not to press the watermen of the city of *London*." If it were a legal right, the city should have insisted on having that right taken notice of in the instructions. Even particular protections from the navy and victualling-office are taken notice of, but there is no mention of any protection from the lord-mayor with respect to his watermen. There is no instance of any officer upon the impress service ever having paid any regard to a water-bailiff's certificate, nor any case produced where the city has taken it up as a matter of right, or insisted upon it as such in a court of justice. Therefore, to give my opinion upon the case as at present stated, and upon the mere fact whether *this exemption*, as *here claimed*, is or is not warranted by immemorial usage, I cannot say it is. At the same time this opinion is without prejudice to any future evidence to be adduced in support of the claim, if any such can be furnished.

WILLES Justice—Two things have been mentioned in the argument of this case which I think it necessary to take notice of. *First*, that on the part of the admiralty it has been contended, that the crown by its prerogative cannot grant an exemption from

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being preſſed. As to that, I apprehend the crown can grant ſuch exemption, or at leaſt a protection from the duty impoſed. Becauſe, in the crown alone lies the power of iſſuing preſs warrants. In thoſe warrants, inſtructions are given to the officers not to impreſs any perſon protected by the navy, victualling-office, &c. Even the officers themſelves grant protections: *a fortiori* therefore, if the officers and inferior boards can grant protections, the crown by its prerogative is entitled to the ſame privilege. *Secondly*, it has been inſiſted, that no authority leſs than an act of the legiſlature can grant an exemption. With regard to that, if the right of impreſſing was founded on an act of parliament, no authority leſs than that of the legiſlature could exempt from it. But this right is founded on immemorial uſage, and though not ſpecially given by act of parliament, is recognized by many. Therefore, I am of opinion, there may be an exception to it upon the ſame ground.—As to the claim of the preſent defendant, one objection is, that he is not entitled to the exemption, becauſe he was not in the actual ſervice of the lord-mayor at the time. But that is putting the queſtion upon a very great nicety indeed. He certainly was within the limits of the conſervancy, and ready to have ſerved, if called on duty. The principal point is, the nature of the uſage ſet up in ſupport of the claim; whether in point of fact, the evidence amounts to proof of an immemorial uſage. As to that, I think the evidence very weak. The affidavits in ſupport of the rule, are merely of the apprehenſions of ſome of the city watermen reſpecting their exemption, founded on the fact of their having heard that ſeveral perſons had been diſcharged; and the inſtances produced are but *four* in number. *None* of them however are ſtated to be claims *of right*. Of the four, only one inſtance is entered in the admiralty books; and that, upon the face of the anſwer given to the application, clearly appears to have been a requiſition of favour. As to the other three, no notice whatever is taken of them: Whereas, if they had been claimed and acquieſced in as a matter of right, it is impoſſible but there muſt have been an entry of them in the admiralty books. The proviſions made by the ſtat. 2 & 3 *Philip & Mary*, and the obſervations made on it by Mr. Solicitor General, have great weight with me. If any ſuch right had exiſted at that time, it was the duty of the city to have aſſerted it, and to have ſeen that theſe men were properly protected. As to the retainer itſelf, the only proof of it is the certificate of the water-bailiff, who ſpeaks of a *due admiſſion*.

That implies that there is a book or entry of admiſſions. But no ſuch book or entry of admiſſions is produced. Nor is there any badge, livery, or regular ſalary fixed. In *Charles* the *ſecond*'s time, upon a complaint by a peer to the houſe of lords of a breach of privilege in impreſſing one of his watermen, the houſe refuſed to vote it a breach of privilege. As to the utility of theſe men, it is of no conſequence: The lord-mayor can have little difficulty in finding watermen for the purpoſes in which theſe men are employed. Therefore I do not think, there is any thing that ſufficiently points out the nature of this ſervice or the uſage to be ſuch, as lays a foundation for the exemption and privilege ſet up. 1776. REX *verſus* TUBBS.

ASHHURST Juſtice.—The queſtion is, if the uſage of this exemption is ſufficiently made out. If it were coextenſive with the power of preſſing, which depends upon immemorial uſage, both would ſtand upon the ſame footing. But I think the evidence of the exemption in this caſe, *as a matter of right*, is very ſlender indeed. Only four inſtances have been produced; one of which clearly appears to have been aſked and granted as a matter of favour. In a caſe of preſcription, any inſtance of aſking the thing as a favour, is ſtronger than an hundred inſtances of uſage. Here there is no evidence of its having been allowed as a matter of right. Therefore I concur with the reſt of the court, in thinking that the exemption is not ſufficiently proved.

Per Cur. Rule diſcharged.

THE END OF MICHAELMAS TERM.

HILARY TERM

17 GEORGE III. *B. R.* 1777.

Thurſday, Jan. 23d.

REX *verſus* Mayor, Aldermen *and* Capital Burgeſſes *of* AXBRIDGE.

The court will not grant a *mandamus* to reſtore a perſon, where it is *confeſſed* he was *rightly* removed; tho' he had *no notice* at the time.

UPON ſhewing cauſe againſt a *mandamus* to reſtore *John Gaiſford* to the office of town clerk, the corporation laid before the court, a very full and ſufficient cauſe for removing him; and that he himſelf had moſt poſitively and openly declared to the corporation, over and over again, that he would do no more of their buſineſs.

The proſecutor's counſel admitted that there was ſufficient cauſe of amotion; but objected that they had removed him, *without notice* to appear and defend himſelf.

Lord MANSFIELD.—The court will not grant a party the aſſiſtance of this prerogative writ, when it is acknowledged, that the corporation had very ſufficient cauſe to remove him; and when they would undoubtedly remove him again, the very inſtant he ſhould be reſtored. Therefore let the rule be diſcharged.

Rule diſcharged.

Friday, Jan. 24th.

An information *qui tam* upon the ſtat. 8 *Geo.* 1. *c.* 27. for a fraud in weighing and packing butter, exhibited in the ſheriff's court at *York*, may be removed into *B. R.* by writ of *habeas corpus cum cauſâ.*

HARTLEY *qui tam, verſus* HOOKER.

THIS was an information *qui tam* exhibited in the ſheriff's court of the city of *York*, againſt the defendant for a penalty of a firkin, for a fraud in weighing and packing butter in the market of the city of *York*; founded on the ſtatute 8 *Geo.* 1. *c.* 27. for regulating the market of the ſaid city; which ſtatute directs, "that if any firkin, *&c.* of butter ſhall be "faulty in quantity or quality, the owner ſhall be liable to the "forfeitures in ſtat. 13 & 14 *Car.* 2. *c.* 26." By this latter ſtatute it is provided, "That all offences ſhall be determined in the

"ſeſſions

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"seſſions of peace for the county, city, borough, town or "liberty, or in the *court of record* of the city, town, or borough, "wherein ſuch offence ſhall be committed." The defendant had removed the information into this court by writ of *habeas corpus cum cauſâ*; whereupon the plaintiff moved for a *procedendo*: and now, upon ſhewing cauſe, Mr *Lee* in ſupport of the *procedendo* argued, that this being a *new* created offence of which the court had *no original juriſdiction*, the court could not, by awarding this writ to remove the cauſe, give itſelf juriſdiction: and cited *Rex* verſus *Wright*, 1 *Bur.* 543. *Heſketh* verſus *Braddock*, 3 *Bur.* 1,847. *Comyns Dig. tit. Procedendo.* 1 *Sid.* 296. 1 *Lev.* 14.

Mr. *Wallace*, *contra*, contended, that the juriſdiction of this court could never be taken away but by expreſs words; and that there were no ſuch words in the ſtat. 8 *Geo.* 1. *c.* 27. or in the ſtat. 13 & 14 *Car* 2. *c.* 26. As to the caſes cited, they only prove that an *indictment* will *not* lie upon a *penal* ſtatute, for a *new* offence: And no doubt, where a new offence is created by ſtatute and a particular mode of puniſhment is preſcribed, it muſt be purſued. But where this court has the ſame juriſdiction, and can give the ſame remedy (which is the caſe here), their juriſdiction is not taken away; And he cited the reſolution of the judges in 1 *Jones*, 193. upon the ſtatute 21 *Jac.* 1. *c.* 4. *ſect.* 1. *Shoyle* v. *Taylor*, *Cro. Jac.* 178. *Rex* v. *Gaul*, 1 *Salk.* 372. *Cro. Jac.* 643, *Caſtle*'s caſe.

Lord MANSFIELD.—Suppoſe a writ of error had been brought, Would the juriſdiction be taken away in that caſe? Mr. *Lee*. I ſhould think not.

Lord MANSFIELD.—That decides the queſtion. There is the cleareſt diſtinction that can be made. If a *new* offence is *created* by *ſtatute*, and a *ſpecial juriſdiction out of the courſe of the common law* is preſcribed, it muſt be followed. If not ſtrictly purſued, all is a nullity, and *coram non judice*; and objections may be taken in any ſtage of the cauſe. In ſuch caſe there is no occaſion to ouſt the common law courts; becauſe not being an offence at common law, but puniſhable only *ſub modo*, in the particular manner preſcribed, they never could have juriſdiction. But where a *new* offence is *created* and directed to be tried in an *inferior court*, eſtabliſhed according to the courſe of the common law, ſuch inferior court tries the offence as a *common law* court; ſubject to be removed by writs of *error*, *habeas corpus*, *certiorari*, and to all the conſequences of common law proceedings. In that

If juriſdiction be given to an inferior court of common law to try a *new* offence *created* by ſtatute, the proceedings may be removed by *habeas corpus cum cauſâ*, or *certiorari*, unleſs expreſsly taken away. *Secus*, where the ſtatute creating the offence, preſcribes a ſpecial juriſdiction not known to the common law.

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that caſe, this court cannot be ouſted of its juriſdiction without expreſs negative words. Here it is clearly a common law proceeding, and therefore the removal of it into this court follows of courſe.

The other Judges were of the ſame opinion.

Per Cur. Rule for a *procedendo* diſcharged.

Same day.

TAYLOR *verſus* MILLS and MAGNALL.

A ſurety in a bond who pays the debt *after* a commiſſion of bankruptcy iſſued againſt his principal, is not barred by the certificate, tho' the penalty of the bond was forfeited *before*.

UPON ſhewing cauſe why a new trial ſhould not be granted, the caſe appeared to be as follows: This was an action for money paid, laid out and expended to the uſe of the defendants, and was tried at the Summer Aſſizes at *Lancaſter*, 1776. The defendants *Mills* and *Magnall*, were partners with one *Bailey*; and in order to raiſe money the partnerſhip had entered into bonds. In the year 1765, *Bailey* withdrew from the partnerſhip; and wiſhing to be diſcharged from theſe bonds, application was made to the plaintiff to become ſurety inſtead of *Bailey*. He did ſo. Upon which the former bonds were delivered to *Bailey* to be cancelled. The bonds became due; then the defendants became bankrupts. When the obligees had got as much as they could from the partnerſhip eſtate, and which amounted to no more than 6*s*. in the pound, they came upon the plaintiff for the reſidue. He accordingly paid it; and then brought his action for money paid, laid out, and expended.—At the trial an objection was made that the bonds were not executed by *Magnall*; in anſwer to which, an affidavit was produced by *Magnall*, in which he admitted he was liable as well as the reſt, and would have executed the bonds if he had been in the country at the time. Upon this, the jury found a verdict for the plaintiff.

The cauſe was argued laſt term by Mr. *Wallace* and Mr. *Lee* for the plaintiff, and by Mr. *Dunning* for the defendants: And two queſtions were made; 1ſt, Whether a ſurety in a bond, who pays the debt after a commiſſion of bankruptcy iſſued againſt his principal, can maintain an action againſt his principal for the money ſo paid, the bond being forfeited before the bankruptcy, and the principal in poſſeſſion of his certificate? 2dly, Whether the defendant *Magnall* was liable, not having executed the bonds? With reſpect to the latter queſtion, the court, upon a ſuggeſtion that the affidavit of *Magnall* was a ſurpriſe upon him at the trial, ordered the cauſe to ſtand over to this term.—Upon the firſt queſtion it was argued in ſupport of the verdict, that the plaintiff not having paid the debt till after the bankruptcy, clearly could

not

not have been admitted a creditor under the commiſſion: becauſe he could not ſwear that the defendant was juſtly and truly indebted to him *before* the *date* and ſuing forth of the commiſſion: And the caſes of *Chilton* verſus *Wiffin*, *Trin.* 8 *Geo.* 3. *C. B.* 3 *Wilſ* 13. *Goddard* verſus *Vanderheyden*, *Ibid.* 12 *Geo.* 3. *C. B.* 3 *Wilſ.* 262. ſince reported alſo in 2 *Blackſt. Rep.* 794. were cited. 1777. TAYLOR *verſus* MILLS *et al.*

For the defendants *contra*, it was contended, that the debt being due to the obligees, and the *penalty forfeited* at the time the commiſſion iſſued, was compleatly diſcharged and done away by the certificate. If ſo, the ſubſequent payment by *Taylor* could not revive the debt, and give a new cauſe of action to him as a new creditor. That the operation of the certificate as declared by the ſtatute was, to diſcharge the bankrupt from all his *then debts*; not from all his *then creditors*. But if, when diſcharged from an action by *one* creditor, he were to remain liable at the ſuit of *another* for the *ſame* debt, it would in effect be no diſcharge at all. Beſides, in this caſe, the original creditors had actually received a dividend from the defendant's eſtate of 6*s.* in the pound, and there might be a proſpect of more. If ſo, the plaintiff ought to reſort to the commiſſion, and to ſtand in the place of the original creditors: but, as againſt the defendants, he was clearly barred by the certificate. Upon this ground, the court ſeemed clearly of opinion againſt the new trial; and that the certificate, though it was a diſcharge to the defendants as againſt the original obligees who had ſought relief under the commiſſion, yet was clearly no bar to the plaintiff's demand, which accrued *ſubſequent* to the commiſſion. But they ordered it to ſtand over upon the ground of ſurpriſe. When it came on again this day, this latter ground ſeemed to be abandoned; and the firſt only relied on.

Mr. *Dunning* and Mr. *Wilſon* for the defendants. Mr. *Wallace* for the plaintiff.

Lord MANSFIELD.—When this cauſe came on laſt term, the court gave an abſolute opinion upon this point, and diſpoſed of it; they only gave leave for the defendant to file an affidavit as to the matter of ſurpriſe that was ſuggeſted, and to argue it upon that ground if he thought proper. But ſuppoſing the queſtion ſtill open, I continue of the ſame opinion: And this caſe is not harder than every other caſe of a debt ariſing *after bankruptcy* upon a *pre-exiſting ground*. At the time of the bankruptcy, the defendants were not indebted to *Taylor*: He clearly therefore, could not come in as a creditor under the commiſſion.

He,

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He was not *damnified* at that time: And *till damnified* (which he could not be till he had been called upon and had paid), he could not bring an action. He did *not* pay *till after* the commiſſion iſſued. Conſequently, his whole damage and cauſe of action aroſe *after the bankruptcy*; and therefore could not be diſcharged by the certificate.—So the caſe ſtands as to the plaintiff. With reſpect to the money received by the original creditors under the commiſſion, it is a diſcharge of ſo much of the debt; and the ſurety is only liable for the remainder: Conſequently he can recover no more againſt the defendants. But as to *that*, he is a new creditor, and therefore is not barred by the certificate. It ſeems to me an extremely clear caſe, and not different from any where the cauſe of action, though it ariſes after the bankruptcy, is founded on a pre-exiſting ground.

Aſton, *Willes*, and *Aſhhurſt* Juſtices, were of the ſame opinion.

Per Cur. Rule for a new trial diſcharged.

Same day.

ERNST *et al. verſus* SCIACCALUGA.

MR. *Dunning* ſhewed cauſe againſt the defendant's being diſcharged out of cuſtody upon filing common bail. He had been diſcharged under the inſolvent debtors' act 16 *Geo.* 3. *c.* 38. and afterwards held to ſpecial bail for a debt *accruing ſubſequent* to the 22d of *January* 1776, *viz.* in *May* following. Mr. *Dunning* admitted, that by *ſect.* 33. no perſon diſcharged under this act, could be arreſted for any debt contracted or growing due *before* the 22d of *January* 1776. But the legiſlature, foreſeeing a caſe might happen, where a party might be indebted for a cauſe of action ſubſequent to that time, had by the next ſection (34) expreſsly provided, "that no priſoner ſhould "be diſcharged of any debt *ſubſequent* to the 22d of *January* "1776: And if any priſoner ſhould ſtand charged with debts "previous, as well as ſubſequent, to that day, the juſtices "ſhould diſcharge him as to the previous debts, and remand him "for all debts he ſhould ſtand charged with in cuſtody ſubſe-"quent to the ſaid time." That here the debt, though incurred previous to the defendant's being diſcharged, was not contracted till long after the 22d of *January*; therefore, could not be diſcharged under this act: And conſequently, the defendant was rightly held to bail.

Mr.

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Mr. *Howorth, contra*, ſaid, the doubt in this caſe aroſe upon the 22d ſection of the ſtatute; by which it was enacted, "that "the creditors of any perſon diſcharged under that act, may "commence any ſuit againſt ſuch priſoner for the recovery of "any ſum which ſhall be *due* at *the time of his diſcharge*, but ſhall "not hold ſuch priſoner to ſpecial bail." That theſe words "*at the time of his diſcharge*" meant to include *all* debts *due at that time*; and therefore, this being confeſſedly a debt previous to the defendant's diſcharge, the plaintiff, by the expreſs words of the act, was precluded from holding him to ſpecial bail. He therefore prayed the rule might be made abſolute.

Lord MANSFIELD.—Nothing can be clearer than this caſe. The act does not mean to diſcharge any debt contracted after the 22d of *January* 1776. The legiſlature has expreſsly drawn the line there. Here the debt, though contracted before the defendant's diſcharge, was ſubſequent to the 22d of *January*: Clearly therefore he might be held to ſpecial bail.

ASTON, Juſtice.—It is plain, upon looking into the different clauſes of the act, that the juſtices have no power to diſcharge from any debt due after the 22d of *January*. The words of the 33d clauſe are, "that no perſon ſhall be arreſted for any debt "contracted *before* the 22d of *January*, 1776." The 41ſt clauſe makes it ſtill clearer. A man might be charged in cuſtody, but not in execution. The act therefore, reciting "that certain evils have ariſen from the future effects of debtors "being made liable," provides, "that ſuch future effects only "of ſuch perſons as are there particularly mentioned ſhall be "liable to be taken in execution." Another caſe might happen; a man might not be charged at all, therefore, the 42d clauſe ſays, "if any action ſhall be commenced *after ſuch time*, you "ſhall not impriſon the debtor's perſon, nor proceed againſt "any effects not mentioned in the antecedent clauſe." All theſe clauſes clearly relate to debts previous to the 22d of *January* only. But here the debt accrued ſubſequent to that time.—Therefore the rule muſt be diſcharged.

WILLES, Juſtice.—On the laſt day of laſt term I had ſome doubts, but now I am ſatisfied.

ASHHURST, Juſtice.—I am of the ſame opinion.

Per Cur. Rule diſcharged.

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Same day.

CHARTER *verſus* JAQUES *et al.*

Affidavit in *trover*, "that the "defend- "ants have "*poſſeſſed* "them- "ſelves of "divers "goods be- "longing "to the "plaintiff, "and have "*refuſed* to "deliver "them up; "and that "*they or* "*ſome of* "*them* have "*converted* "and diſ- "poſed of "them to "their own "uſe," is ſufficient to hold to bail.

THIS came before the court on a rule to ſhew cauſe why the defendants ſhould not be diſcharged upon filing common bail. They had been held to bail in an action of *trover* upon an affidavit, in which the plaintiff ſwore, "that the defendants (in number ten) had poſſeſſed themſelves of divers "goods, belonging to him the plaintiff, and had *refuſed to deliver them up*; and that *they or ſome of them* had converted and "diſpoſed of them to their own uſe."—Mr. *Dunning* who ſhewed cauſe inſiſted, that if the latter words "*they or ſome of* "*them, &c.*' were ſtruck out, the other part of the affidavit was ſufficient to hold the defendants to bail; it being poſitively ſworn that the goods were in their poſſeſſion, and that they had *all* refuſed to deliver them up.

Mr. *Manſfield* and Mr. *Morris* in ſupport of the rule inſiſted, that *converſion* being the *giſt* of the action, the words "*they or* "*ſome of them*" were not ſufficiently preciſe to hold the defendants to bail; and if not, the other words alone clearly were not ſufficient; poſſeſſion and refuſal being only evidence of a converſion. Mr. *Morris* added, that ſuppoſing the other words would have been ſufficient alone, yet being rendered uncertain by what followed, the whole was bad; and cited 4 *Bur.* 2,126. *Champion* verſus *Gilbert*, to that purpoſe.

Lord MANSFIELD.—The only queſtion is, upon the particular words of the affidavit. The plaintiff ſwears poſitively, that *all* the defendants have poſſeſſed themſelves of the goods, and that they have *all refuſed* to deliver them up: Which is of itſelf a converſion. They could not have refuſed to deliver the goods up, unleſs they had been demanded; and if all the defendants did not refuſe to deliver them up, the plaintiff is perjured. The ſubſequent words "that *they or ſome of them* have converted" are ſurpluſage.

Let the rule be diſcharged.

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REX *verſus* MONDAY.

Saturday, Jan. 25th.

THIS was an Information in nature of *quo warranto* againſt the defendant; to ſhew by what authority he exerciſed the office of alderman of the borough of *Portſmouth*. The defendant, by way of plea, ſet forth a charter made in the 13th year of *Car.* 1ſt: And that he was duly elected under the charter. At the trial, the jury found a ſpecial verdict, the material facts of which were as follow: "That by a charter made in the 13th year "of *Charles* the 1ſt, the mayor, burgeſſes, and inhabitants of "*Portſmouth* were declared to be incorporated by the name of "the mayor, aldermen, and burgeſſes of the ſaid borough, and "were to conſiſt of a mayor, twelve aldermen, *&c.* That after "nominating the firſt mayor and twelve aldermen the charter "provided for the future election of the mayor and aldermen as "follows: That the mayor, aldermen, and burgeſſes for the "time being, or *the greater part of* them, from time to time, "may, and ſhall have power and authority yearly, on every "*Monday* ſevennight before the feaſt of St. *Michael the Arch-angel*, to aſſemble themſelves together or the greater part of "them at the *Guildhall*, *&c.* and to continue there till *they*, or "*the greater part* of them then and there aſſembled, ſhall name "and elect one of the aldermen of the borough, *&c.* to be "mayor of the ſaid borough." "That if at any time it ſhould "ſo happen that any one or more of the *aldermen* of the ſaid "borough for the time being ſhould die or be removed, that "then and ſo often it ſhould be lawful for the *mayor* and the *reſt* "of the *aldermen* for the *time being*, or the *greater part* of them, "to elect or prefer one or more others of the burgeſſes of the "ſaid borough for the time being to be an alderman, or alder-"men of the ſaid borough, *&c.*" The ſpecial verdict then ſtated, that from the time of the granting and acceptance of the ſaid charter, whenſoever it has happened that any alderman hath died or been removed, the mayor and all the other aldermen, or the *major part* of them, have aſſembled themſelves together, *&c.* and have *concurred*, and have uſed and been accuſtomed to concur, in ſuch election. That on the 3d of *May*, 1775, there was only a mayor, *viz. Philip Varlo*, and five aldermen, *viz.* Sir *Edward Hawke*, *John Carter*, *Edward Linzee*, *T. White*, and *W. White*, and no more; the ſeven remaining offices being vacant

Election of the mayor.

Election of the aldermen.

1777. vacant by death. That on the ſaid 3d of *May*, 1775, *Philip Varlo*, *John Carter*, *Edward Linzee*, *T. White*, and *W. White*, (the ſaid Sir *Edward Hawke* being abſent and reſiding without the reach of ſummons,) aſſembled themſelves at the *Guildhall* for the purpoſe of electing ſeven burgeſſes, to fill up the vacancies. That previous to any election being had, *J. Carter*, *T. White*, and *W. White* proteſted againſt the meeting. That *Varlo* the mayor called on *Carter*, and the two *Whites*, to nominate proper perſons to fill up the vacancies, which they then omitted to do; that thereupon *Varlo* the mayor, and *E. Linzee* delivered in a liſt of ſeven perſons, of which the defendant *Monday*, who was duly qualified, was one: That two, *viz. Varlo* the mayor, and *Linzee* one of the aldermen ſo met, elected theſe ſeven: But that the other three aldermen, *viz. Carter* and the two *Whites*, proteſted and voted againſt them. That *Monday* was placed firſt on the liſt, as being the propereſt perſon to be ſenior alderman. That then *Carter* and the two *Whites* delivered in a liſt of ſeven other burgeſſes; upon which *Varlo* and *Linzee* made an objection to *three* of them, for *not having taken the Sacrament*; and to *three* others, for *non-reſidence*; both which grounds of objection were *known* to *Carter* and the two *Whites* at the time of the election. That in other reſpects the above ſix perſons were all duly qualified; and that *Goodwin*, who was the *ſeventh*, was qualified in every reſpect whatſoever. *Six* iſſues were taken on the plea: The queſtion on the ſpecial verdict aroſe upon the fourth and ſixth; the other *four* were found for the defendant.

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Mr. Serjeant *Groſe* for the plaintiff, after ſtating the ſpecial verdict as above, argued as follows: The queſtion is, Whether the defendant *Monday* was *duly elected?* That queſtion depends upon the conſtruction of the charter; whether the words "*the* "*greater part of them*," in the proviſion relative to the election of aldermen, means a *majority* of the mayor and aldermen *then in being*, or a majority of thoſe *preſent* at the time of election. I ſhall contend they mean a *concurrent majority* of the *then exiſting body* of mayor and aldermen. If I am right in this conſtruction, there is an end of the queſtion; for it appears by the ſpecial verdict, that the defendant was *not* choſen by a *majority* of the *exiſting body*. But ſuppoſing the conſtruction ſhould be (as contended on the other ſide,) that a *majority* of the mayor and aldermen *preſent* may elect; ſtill I ſay, the defendant was *not* duly elected. 1ſt. The election muſt be by a concurrent majority of the then exiſting body. The words of the charter are, "*ma-*

"*jor*

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"*jor pars eorum.*" Theſe words have been differently conſtrued in different charters. They may, from the neceſſary conſtruction of ſome charters, as applied to an *indefinite* body, mean a *majority* of thoſe *preſent*; as applied to a *definite* body, a *majority* of the exiſting body at that time. But here, I ſay, from the neceſſary conſtruction of the words of the charter, ſupported by conſtant *uſage*, the *majority* of the *exiſting body* of mayor and aldermen muſt concur in the election of an alderman. This is apparent, firſt from the direction relative to the election of the mayor. The corporation is to conſiſt of a mayor, twelve aldermen, and an indefinite number of burgeſſes. The mayor is to be choſen by the indefinite number of mayor, aldermen, and burgeſſes; and for this purpoſe the charter directs, "that the "*mayor, aldermen*, and *burgeſſes*, or the *greater part* of them, "ſhall have power and authority to *aſſemble themſelves*, or the "*greater part of them*, at the *Guildhall*, on a certain day, and "to continue there, till *they*, or the *greater part of them*, there "*then aſſembled*, ſhall name and elect one of the aldermen to "be *mayor*." So that, where the charter intended the election ſhould be by the *majority* of thoſe *aſſembled*, it has directed it in expreſs terms. But in the clauſe which preſcribes the mode of electing the aldermen, the direction is, "that the whole exiſt-"ing body or the major part of them ſhall elect." The difference therefore is preciſely marked; and the inference from it is deciſive. For if the charter had intended that both elections ſhould be by the *majority of thoſe aſſembled*, it would have made uſe of the ſame words in both caſes. I agree, if the *uſage* had been the other way, it might have afforded a ground for the court to favour the conſtruction which the defendant contends for: But here it is expreſsly found, that ever ſince the acceptance of the charter, the uſage has conſtantly been, for the majority of the mayor and aldermen for the time being, to concur in the election of an alderman. Beſides, this is a corporation by preſcription: So that the charter may have been *accepted in part*, and *rejected in part*: And if ſo, this uſage may have been anterior even to the charter. Therefore, ſuppoſing it not to be evident upon the face of the charter itſelf, that the major part of the exiſting body of mayor and aldermen ought to concur, the *uſage* puts it beyond a doubt, that they *muſt* concur. If I am right in this part of the caſe, there is an end of the queſtion. But 2*dly*, ſuppoſing the election may be by a *majority* of the greater part of the *exiſting* body *then preſent*, it is not pre-

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tended on the other side that the defendant *Monday* was elected by more than *two*. Now there were *five* members *present*. Therefore, even in that way of stating it, the defendant clearly had not a majority. But to this it will be answered, *1st*, that the *three* could not invalidate the election by the *two*, but by voting for some other persons who were *eligible*. In reply, I say, they *did*: For they voted for a list of seven, of which the defendant was not one. I am aware that as to *three* of these seven it will be objected, that the votes in their favour were thrown away, because they were *non residents*, and the electors *apprised* of the fact at the time. As to that, residence previous to a person's being elected alderman is not required by the charter. The aldermen are to be elected out of the burgesses: And when elected aldermen, the charter directs that they shall be resident, under certain penalties and fines imposed. But *as burgesses*, previous to their becoming aldermen, they are under no obligation whatever to reside: Consequently, absence can be no disqualification. The next objection made to this list is, that *three* others *had not received the sacrament* within a twelve-month preceding the election; and that the electors were likewise apprised of this fact. But I submit that by the stat. 5 *Geo.* 1. *c.* 6. *sect.* 3. it is plain, the election is *voidable only*, on that account, and *not void*: For by the words of that act it is provided, "that if the "party be not *removed*, or a *prosecution commenced* within *six* "*months*, no *incapacity* or *disability* shall be *incurred*:" And so it was expressly decided in *Crawford* v. *Powell*, 2 *Bur.* 1,016. If the election is only voidable, these persons had certainly an *inchoate* right, which might afterwards be perfected. Most clearly therefore, the defendant could not be elected at that time; because no man can be elected *de bene esse*. But *3dly*, allowing for a moment that the *six* persons objected to were ineligible, the *seventh*, whose name is *Goodwin*, stands *unobjected* to: His election therefore was indisputably good. If so, how is it possible that any one of the *seven* persons proposed and voted for by the *two* only, can be said to be duly elected? For they were all voted for *uno flatu*; not separately, and distinctly, one after the other; but together and at one and the same time. Who then shall say *which* of the seven shall be excluded, or *which six* shall be elected with *Goodwin*? It is impossible such an election can be good. Again, taking it that *three* only out of the *six* objected to by the other side were ineligible, there must be *four* excluded from their list; which would make the absurdity the

greater. There could have been no means of deciding who should be excluded, or who should remain elected, but by ſetting them all up again, which was not done. Therefore upon either conſtruction of the charter, whether the words "*major* "*pars eorum*" be interpreted to mean the majority of the exiſting body, or the greater part of the members preſent, the defendant clearly *was not duly elected.* 1777. REX *obſid* MONDAYS

Mr. *Buller contra* for the defendant. As to the uſage, no ſuch uſage was ever ſtated in a ſpecial verdict before, nor can it have any thing to do with the conſtruction of the charter. It only proves that the corporation hitherto have always acted for the beſt, and been unanimous in the choice of the perſons elected. In the preſent caſe, *three* of the members have endeavoured to obſtruct the election. They were called upon to nominate proper perſons, which they refuſed to do: Upon this, the *two* other members preſent, nominate a liſt of ſeven, and proceed to election. Inſtead of voting, the three proteſt both againſt the election and the elected. But it is ſettled that the *mere diſſent* of the *majority*, will not invalidate an *election* by the *minority*, unleſs they vote for *ſomebody* elſe. The ſpecial verdict ſtates, that they *did* vote for other perſons. But I ſhall contend that theſe perſons, were to their knowledge incapacitated at the time. The queſtion therefore is, Whether the *three* could by ſuch conduct prevent the *two* from filling up the vacancies with proper and eligible perſons?

Much argument has been made upon the conſtruction of the words "*major pars eorum.*" With reſpect to that, the firſt thing to be inquired into is, Whether there was a legal aſſembly? Now, I admit that by the charter the majority of the exiſting body muſt meet; and here all but one met. The aſſembly therefore was legally conſtituted. If ſo, it is ſettled, that the majority of the body, legally met, have a right to elect. This reduces the caſe to the fact of the election itſelf. But *firſt*, as to this being a borough by preſcription, it is not ſo ſtated in the ſpecial verdict, nor is the aſſertion warranted in fact. But if it were, a corporation cannot accept a charter in part and reject it in part; but muſt receive or refuſe it in *toto*. And ſo it was expreſsly decided in the caſe of *Yarmouth*. The queſtion then is, Whether the *three* could, by the proceedings ſtated in the ſpecial verdict, prevent the other *two* from filling up the vacancies? I ſhall prove from a variety of authorities that they could not. 1ſt, It is clear upon the face of the verdict,

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that they knew of the incapacity of the *ſix*; that they were *non-reſidents*; *diſſenters*, and *had not taken the ſacrament*. With reſpect to the non-reſidents it has been aſked, how it appears by the charter that non-reſidence is a diſqualification? I anſwer, that though the charter does not expreſsly provide that every burgeſs ſhall reſide, it does not follow that every burgeſs is to abſent himſelf from the borough. There will always be ſufficient who do reſide, and they are the perſons who ought to be choſen. As to the aldermen, the charter and all the circumſtances ſhew, that they muſt be reſident. If the mayor is ill, one of the aldermen muſt act as his deputy: They are the judges of record, they are to hold the courts, *&c.* in ſhort, they are to perform various requiſites, all which ſhew they muſt reſide. And by law they ought to do ſo. In 4 *Mod.* 36. it is laid down, "that every alderman ought to be a citizen and "*inhabitant* of the city where he is an alderman:" and in *Comb.* 197. S. C. *Eyre* Juſtice ſays, "reſidence is *incident* to "the duty and place of an alderman." *Carthew* 227. *Vaughan* v. *Lewis*, S. P. If ſo, non-reſidence is a cauſe for not admitting an abſentee to be alderman: For in 5 *Co.* 58. it is laid down, "that whatever is ſufficient cauſe to deprive an incumbent is "a good cauſe to *refuſe* him."

As to the three who had omitted to take the ſacrament, the ſtat. 13 *Car.* 2. *c.* 12. expreſsly enacts, "That no perſon ſhall "be choſen who has not received the ſacrament within a twelve-"month preceding the election; and in default of doing ſo, the "election ſhall be void." And ſo it was determined in *Harriſon* verſus *Evans*,* 5th *July* 1762.

That was an action of debt on a bye-law brought by the chamberlain of *London*, againſt the defendant for not accepting the office of ſheriff. The defendant by way of plea ſtated, that he was a *diſſenter* from the church of *England*, and had always attended the adminiſtration of the ſacrament according to the forms of his own religion, and that he could not *in conſcience* receive it according to the *rites of the church of England*. The queſtion was, Whether he was liable to the penalty of the bye-law or could ſerve the office? Lord Chief Juſtice *Wilmot* in delivering the judgment ſaid, "The ſtat. 13 *Car.* 2. *c.* 12. is not "only addreſſed to the *elected*, and a prohibition upon them, "but a prohibition laid down to the *electors*, if they have "notice: The legiſlature has commanded them not to chuſe a

* See a ſhort ſtate of this caſe, *ſupra*, 393. *n.*

"non-

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" non-conformiſt, becauſe he ought not to be truſted. And " *Evans*, by refuſing to take the ſacrament, has negatived the " election." Both the ſtatute, therefore, and authorities ſay the *election is void:* Conſequently with reſpect to any legal effect or operation, it is as if there had been no election. But it is ſaid, this objection is aided by the ſtat. 5 *Geo.* 1. *c.* 6. *ſect.* 3. and the election by that act is rendered *voidable* only, and not *void.* That ſtatute however has no relation to the preſent caſe: It applies only to perſons who are in *actual* poſſeſſion of the office, and was made to quiet ſuch poſſeſſion, if no legal remedy was purſued within a certain time: And upon that ground it was that the caſe of *Crawford* verſus *Powell* was decided. But theſe perſons never were in poſſeſſion of the office: The objection was made at the time of the election; therefore the ſtat. 5 *Geo.* 1. *c.* 6. could not vary the operation of the ſtat. 13 *Car.* 2. And ſo Lord Chief Juſtice *Wilmot* ſaid in *Harriſon* verſus *Evans.*

If the *ſix* were *diſqualified*, and the corporation were previouſly appriſed of their incapacity, the only remaining queſtion is, Whether the *two* had a power to elect, and whether the perſons choſen by them were duly elected? It is aſked, which ſix of the other liſt ſhall be ſaid to be duly elected with *Goodwin?* As to that, when there are ſix vacancies, and ſix candidates propoſed, and each candidate is choſen to fill the vacancy that correſponds to the order in which he ſtands upon the liſt, it is the ſame thing as if each had been elected ſeparately. The ſpecial verdict ſtates " that *Monday* ſtood *firſt* upon the liſt, as " being the propereſt perſon to fill the office of *ſenior* alderman." If therefore I can ſhew, either from principles or authority, that the *two* who voted for him had a power to elect, there can be no doubt of his being duly elected.—Two requiſites are neceſſary to make a good election. 1. A capacity in the *electors.* 2. A capacity in the *elected:* And unleſs both concur, the election is a nullity. With reſpect to the capacity of the *electors*, their right is this: They cannot ſay there ſhall be *no* election; but they are to elect; therefore, though they may vote and prefer *one* to fill an office, they cannot ſay that *ſuch a one* ſhall *not* be preferred; or, by merely ſaying, " *We diſſent to every one pro-* " *poſed,*" prevent any election at all. Their right conſiſts in an *affirmative*, not a *negative* declaration. Conſequently, there is no effectual means of voting *againſt one* man, but by voting *for another*; and even then, if ſuch other perſon be *unqualified*, and the *elector* has *notice* of his incapacity, his vote will be thrown

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away. The firſt caſe upon this point, is *Regina* verſus *Boſcawen*. *Paſch.* 13 *Ann. B. R.* There *ten* voted for *Roberts*, who was a qualified perſon, and *ten* for the *defendant*, who was *incapacitated* on account of non inhabitancy. Lord Chief Juſtice *Parker* and the whole court held, "that the votes given for "the latter were *thrown* away, and *Roberts* duly elected." That was the caſe of an *equal* number: But a *minority* does not vary it. For in *Rex* v. *Withers*, *Paſch.* 8 *Geo.* 2. *B. R. five* voters out of *eleven*, voted for the defendant upon a *ſingle* vacancy of a burgeſs for the borough of *Weſtbury*: *Six* others voted for *two* perſons *jointly*: And the court held, that the *double* votes were abſolutely thrown away. So in *Taylor* verſus mayor of *Bath*, *Mich.* 15 *Geo.* 2. *B. R.* *Twenty-eight* electors being aſſembled, 14 voted for *A.* 13 for *B.* and *one* for *C.* *A.* who had the 14 votes was unqualified, and his incapacity known to the electors at the time. *Lee* Chief Juſtice, in his direction to the jury ſaid, that the votes given to *A.* with notice of his incapacity, were thrown away. It afterwards came before the court, when *Lee*, Chief Juſtice, compared it to the caſe of voting for a dead man, and held, that *B.* who had the 13 votes were duly elected: And *Page* Juſtice ſaid, "That in ſuch caſe a *minority* of *two* "only would have been ſufficient to elect the other candidate." The ſame doctrine is laid down in *Oldknow* verſus *Wainwright*, 2 *Bur.* 1,017 —Here it is expreſsly found, that the *three* knew of the incapacity of the *ſix* perſons now objected to; therefore, their votes as to them are entirely thrown away. If ſo, the right of election being in the majority of the mayor and aldermen *for the time being*, and ſuch majority having met, the aſſembly was duly conſtituted; and the election of the defendant, though by a minority, was clearly a good election.

Lord MANSFIELD.—Is there any caſe where the charter has directed the election to be by the majority of the body, in which it has been held that a leſs number than a majority of the whole corporate body can elect? For inſtance, ſuppoſe the corporate body conſiſted of twelve; and two were dead. Is there any inſtance where the charter has ſaid the election ſhall be by a majority of the body; in which it has been held that *ſix*, which are a majority of the remaining *ten*, were ſufficient to elect?

ASTON Juſtice. In the caſe of *Rex* verſus *Reeſe*, and *Rex* verſus *Newſham*, common council man of *Carmarthen* *, it was clearly underſtood

* *Paſch.* 1755.

understood that if the major part of the corporation had been dead, it would have been in fact dissolved, or at least those who survived could not have assembled for the purpose of an election. But here the words seem to confine it to a majority of the members *for the time being*. 1777. REX versus MONDAY.

Lord MANSFIELD.—The general question is, Whether the defendant *Monday* was duly elected an Alderman? That depends upon two particular questions: 1st, Whether the assembly was duly constituted according to the directions of the charter, for the purpose of an election?—2dly, If it were, Whether the body so assembled have proceeded duly and regularly to the election of the defendant? As to the *first*, it has been argued on both sides, that a *majority* of the mayor and aldermen *for the time being*, are sufficient to constitute the assembly; though they do not make a majority of the whole corporate body appointed by the charter. Therefore I will not start a point not agitated at the bar, when the consequences might tend to a dissolution of the corporation. I will take it for granted, that a *majority* of the mayor and aldermen *for the time being*, was sufficient to constitute the corporate assembly: And the fact found by the special verdict is, that the majority of those in being did meet. When the assembly are duly met, I take it to be clear law, that the corporate act may be done by the majority of those who have once regularly constituted the meeting. The remaining question is, Whether the defendant was duly chosen by a majority of the persons so assembled?

There are different kinds of elections: Elections of members of parliament, verderors, corporators, &c. and different questions may arise out of each. Therefore, they must not be confounded together: And the present case must stand upon its own circumstances. Upon the election of a member of parliament or a verderor, where the electors *must* proceed to an election, because they cannot stop for that day, or defer it to another time, there must be a candidate or candidates: And in that case, there is no way of defeating the election of one candidate proposed, but by voting for another. But in the business of corporations, it is a different thing.

This is a motion in the shape and under the name of a proposal made to the *body*, by the mayor, who is the presiding officer, with the concurrence of one of the aldermen. But the essential part is, that it is made by the *mayor*, and he proposes *seven* persons together in one list to fill up seven vacancies. The question

1777. put, upon these seven persons so proposed, is not, *which* of them
— — shall be elected aldermen, but whether the *seven* shall be alder-
REX men? The only answer to be given to such a question is, *yes* or
MONDAY. *no*. Suppose he had put it upon an individual. "I propose "*J. S.* Is it your pleasure that *J. S.* shall be chosen alder-"man?" The answer must have been *yes* or *no*. It is not a question *which* of *two* candidates shall be preferred but whether these seven persons so proposed should be chosen. Upon that motion there is a majority against them both in *substance* and *form*. That makes an end of the whole, and renders it unnecessary to go into the rest of the case. But I will just observe upon it. What sort of an election is this, where the mayor proposes *seven* persons at once? The electors might be inclined to vote for one, two, or three of them, and against the others; therefore they ought to have been put up in a regular way and polled for, *one* by *one*, and *yes* or *no* said to the proposal of each respectively. Such a complicated case never existed before. And what have the majority in fact done? They have voted for *one*, who is clearly well qualified, and duly chosen. So indeed are *three* more to whom in fact there was no solid objection; for non-residence is no objection under this charter. If the doctrine we have heard to-day respecting non-residence were to obtain, it would be of very extensive consequence indeed; and perhaps shake the constitution of half the boroughs in the kingdom. We all know that in *some* boroughs, *residence* is a *precedent* qualification. In fifty others it is not. *Here*, it is *not* a precedent qualification for a *burgess* to be elected an alderman. All the charter requires is, that *after* he *is* elected, he shall be resident:—As to the objection to the three others, because they had not taken the sacrament according to the rites of the church of *England*, I incline to Mr. *Buller*'s reasoning, that the stat. 5 *Geo.* 1. *c.* 6. operates rather as a protection to the possession, and as a bar to the remedy. If a man under this disability has been in possession six months, there shall be no remedy to turn him out: His title shall not afterwards be questioned on that ground. It is similar to the rule laid down by this court in respect of informations where the party has been in possession twenty years. But if this objection is made *recently* before any possession; as suppose the party upon being refused to be sworn in was to apply for a *mandamus*, and the answer on the application should be, that the ground of refusal was because he had not taken the sacrament, I should think it a sufficient objection. It is the possession only that is protected; and that, not till after the expira-

tion

tion of six months. The object of the act was to lessen the rigour of the stat. 13 *Car.* 2. made in warmer times; and that has gone a great way.—Upon the whole, my opinion is, that the election of the defendant cannot be supported. For there are clearly *four* of the other list duly elected. His possession therefore is both against *their right*, and against the opinion of the *majority*. 1777. REX *versus* MONDAY.

I think it necessary to observe upon one thing more, which I took notice of when this matter came on before: Though this is a borough cause, and a litigation with a view to the election of representatives for the borough, there should be a little conscience, for decency's sake. But in order to load the parties with expence, this monstrous special verdict has been made up, and the whole charter set out from beginning to end. Upon a former occasion a volume of unnecessary affidavits were made with the same view. Therefore I order it to be referred to the master to report the expence of the impertinent and unnecessary prolixity of the matter contained in this special verdict.

The three other judges concurred.

Per Cur: Judgment *pro rege.*

PATTISON *versus* BANKES.

Tuesday, Jan. 28.

THIS was an action of debt upon bond dated the 15th of *May* 1770, conditioned for the payment of an annuity. The defendant pleaded bankruptcy. Upon the bond being produced in evidence, the condition recited a lease for a term of years commencing in the year 1761, from the bishop of *Carlisle* to *Hole* and others, which by assignment vested in the plaintiff's testator. The plaintiff's testator assigned this lease to the defendant for an annuity, and the condition of the bond was for the regular payment of the annuity during the residue of the term, and for the performance of covenants. At the trial it was proved that the lease had been surrendered to the bishop, so that the bonds stood merely as a security for payment of the annuity. At the time of the act of bankruptcy and the commission issued, the *penalty* was *not forfeited*, the annuity having been regularly paid up to that time. A verdict was given for the plaintiff, subject to the opinion of court on this question: Whether this were a security within the stat. 7 *Geo.* 1. *c.* 31. all the payments being fixed at certain periods; though the bond itself was

A *bond* for payment of an *annuity* for a term of years is within the stat 7 *Geo.* 1. *c.* 31.—And so are ALL *bonds, bills, notes,* and *other personal securities* payable at a *future* day *certain*, tho' *not* given by the bankrupt for *goods sold* and delivered to him in the course of his trade.

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was not given for goods sold and delivered, or for a debt contracted in the course of trade.—This case came on to be argued on *Wednesday*, *November* 20th, in *Michaelmas* term last, when Mr. *Wallace*, on the part of the plaintiff, mentioned the case of *Swaine* versus *De Mattos* in 2 *Str.* 1,211. But that case appearing strongly against him, and it being suggested on the other side, that the Court of *Common Pleas* had several times recognised it as an authority, Mr. *Wallace* gave the question up, and the court accordingly ordered judgment to be entered for the defendant. But the next day Lord *Mansfield* said, Mr. *Wallace* had been surprised by the above assertion: For inquiry had been made of the judges of the *Common Pleas*, and so far from recognizing the case in *Strange* to be law, they were rather of opinion it was *not* law. The court therefore ordered the case to stand in the paper for argument this term upon the question, whether *such* a bond was within the stat. 7 *Geo.* 1. *c.* 31.?

Mr. *Chambre* for the plaintiff argued, that the statute could not extend to any other cases than those particularly recited in the preamble; *viz.* "Securities for the sale of goods and merchan-"dize." That this was manifest not only from the words of the preamble, but from the *enacting clause*. 1st, The words of the *preamble* recited *no other* securities. 2dly, The only *inconvenience* mentioned in the preamble, was the inconvenience arising from the "*bankruptcy of* the *buyer* of *such goods*." Nothing therefore could more expressly confine it to the case of debts contracted in the course of trade, than the preamble did.—The only remaining question was, whether the provisions of the *enacting clause* extended further. As to that, the words "for the remedy "whereof," could be referable only to the mischief before recited. It was true, the expression "all and every person and "persons who have *given credit*," in a general unqualified sense, were applicable to every *common lender* of money; but here the subsequent words "*on such securities as aforesaid*," plainly shewed, the legislature meant such persons and such securities only as the preamble had before particularly specified. It would perhaps be contended that the words, "such securities" were referable only to the *form* of the securities enumerated in the preamble, *viz.* "bills, bonds, and promissory notes:" But by what rule of construction could they be made applicable to the *form* and not to the *substance* before described; *viz.* for *goods* sold upon credit. According to such a construction, if the vendor were to take a *covenant* to pay the money at a future day, instead of a bond, &c. he could not be admitted to prove his debt

debt under the commiſſion. He added, that this was not the only ſtatute in which the legiſlature, meaning to remedy inconveniences *in trade*, had confined the remedy entirely and *excluſively* to ſuch inconveniences only: And inſtanced the ſtat. 19 *Geo.* 2. *c.* 32. As to the caſe of *Swaine* verſus *De Mattos*, 2 *Str.* 1,211. it was only a *niſi prius* caſe, and the note itſelf extremely ſhort; therefore, entitled to very little weight, againſt the plain import and meaning of the ſtatute. 1777. PATTISON verſus BANKES.

Mr. *Wood* for the defendant *contra* contended, that this being a remedial law, the words of the *enacting clauſe* could not be reſtrained by the preamble. That they were *general*, *viz.* "all "and *every perſon* or perſons;" (not, *merchants* and traders only) "who have or ſhall give credit on ſuch ſecurities as afore-"ſaid to *any* perſon who ſhall become bankrupt, upon a *good* "and valuable *conſideration bonâ fide*, for *any ſum* or *ſums* of "money, or *other* matter or *thing*." Nothing can be more general: And they are a deſcription of the *conſideration*, not of the form of the ſecurity. The intention of the legiſlature was only to put debts payable in future upon a day certain, on the ſame foot as debts actually become due; whether ſuch debts were or were not contracted for goods ſold or in the courſe of trade. In *Tully* verſus *Sparkes*, 2 *Lord Raym.* 1,546. the only ground of deciſion was that the debt was a *contingent* debt; and the court took no notice of its being for a matter out of trade; *viz.* upon a *marriage bond*; which would alone have been ſufficient, if this were a good objection. But it clearly is not. The ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 22. meaning to extend the benefit of the ſtat. 7 *Geo.* 1. *c.* 31, ſtill further, by allowing the creditors there deſcribed to become petitioning creditors, in reciting it, uſes the words of the enacting clauſe, "*perſons taking* "*ſecurity for their money*," in preference to thoſe of the preamble. In *Viner's abridgement*, tit. *Creditor and Bankrupt*, p. 72. *Ex parte Jefferies*, the court decided upon the debt being *contingent*; not becauſe it aroſe upon *marriage articles*, and therefore *out of trade*. *Swaine* v. *De Mattos* is in point, and, though a *niſi prius* caſe, was recognized in *Goddard* verſus *Vanderheyden*, 3 *Wilſ.* 271. There is great reaſon why the ſtatute ſhould extend to all juſt and meritorious creditors. The ſpirit and general principle of the bankrupt laws is to put them all upon a level: The conſtruction in *contingent* caſes has been, to make no queſtion whether the debt did or did not ariſe in trade; but ſimply to inquire whether it were *contingent* or not: and the practice

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by the commiſſioners has been to admit all debts payable at a future day certain, without any diſtinction as to the conſideration, provided it were valuable and *bonâ fide*. Therefore he prayed judgment for the defendant.

Lord *Mansfield*, I am very clear. Firſt, here is a conſtruction by the ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 22. which, without conceiving a doubt, takes it for granted, that the ſtat. 7 *Geo.* 1. *c.* 31. is not merely confined to *ſecurities* for *goods ſold* and delivered in the courſe of trade, but that it extends *generally* to *all* perſonal ſecurities for a *valuable conſideration*, where the time of payment is certain, though poſtponed to a future day: And it corrects the blunder in the preamble of the ſtat. 7 *Geo.* 1. which, after ſpecifying particular ſecurities, adds, "or other *perſons* "*ſecurities*," which clearly ſhould have been "other *perſonal* "ſecurities." A few years after, Lord Chief Juſtice *Lee*, in the caſe of *Swaine* v. *De Mattos* * at *niſi prius*, looked upon it as a general propoſition and a ſettled point. Theſe alone are ſtrong grounds for extending it to *all* ſecurities. But to conſider it upon the conſtruction of the act itſelf. The *preamble* is certainly *ſpecial* and *particular*: Therefore, without expreſs words in the enacting part, the operation of it muſt be confined to the preamble. But there are a variety of caſes, where it has been determined that ſtrong words in the *enacting part* of a ſtatute may extend it beyond the preamble. Here, there are expreſs words in the *enacting part* which are more large than the preamble. The preamble ſays "the conſideration muſt be *goods* "*ſold* upon truſt by *merchants* or *traders*." The enacting part ſays "*all perſons* who ſhall give credit on *ſuch ſecurities* as afore-"ſaid, upon a *good* and *valuable conſideration bonâ fide*, for any "*ſum* or ſums of *money*, or *other matter or thing whatſoever*." The words "*ſuch ſecurities*" are only referable to the ſecurities before particularly mentioned, and in which the day of payment is certain, though not yet come. If the words were leſs general than they are, their meaning is fully explained by the ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 22. and the opinion of *Lee* Chief Juſtice at *niſi prius*. The conſtant practice too of the commiſſioners is very material. Therefore I am well ſatisfied the act extends to *all* perſonal ſecurities for *money* or *other valuable thing* where the day of payment is certain, though not yet come.

* Trin. 17 *Geo.* 2. 2 *Str.* 1211.

ASTON Juſtice.—This being an explanatory law, it does ſeem as if the ſtatute meant only to provide in future, that *ſuch perſons* and *ſuch ſecurities* as are mentioned in the preamble, might be

be admitted under the commiſſion. But the enacting part goes a little further: Since that, the conſtruction put upon it by the ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 22. followed by the opinion of Lord Chief Juſtice *Lee*, and the conſtant practice of the commiſſioners, makes it very ſtrong. 1777. PATTISON *verſus* BANKES.

Per Cur. Judgment for the defendant.

TRUEMAN *verſus* FENTON.

Same day.

A bankrupt, *after* a commiſſion of bankruptcy ſued out, may in conſideration of a debt due *before* the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commiſſion, make ſuch creditor a *ſatisfaction* in *part* or for the *whole* of his debt, by a *new* undertaking or agreement — And *aſſumpſit* will lie upon ſuch new promiſe or undertaking.

THIS was an action on a promiſſory note bearing date the 11th *February* 1775, payable to one *Joſeph Trueman* (the plaintiff's brother) *three* months after date for 67 *l.* and indorſed by him to the plaintiff.

The declaration contained other counts for goods ſold, money had and received, and on an account ſtated.—The defendant pleaded, 1ſt, *Non-aſſumpſit*. 2dly, "That on the 19th *January* "1775, he became bankrupt, and that the debt for which the "ſaid note was given was *due* to the plaintiff *before* ſuch time "as he the defendant *became bankrupt*; and that the note was "given to *Joſeph Trueman* for the uſe of, and for ſecuring to the "ſaid plaintiff his debt *ſo due*." The cauſe was tried before Lord *Mansfield* at the ſittings after *Michaelmas* term 1776, when the jury found a verdict for the plaintiff, damages 72 *l.* 12 *s.* coſts 40 *s.* ſubject to the opinion of the court upon a ſpecial caſe ſtating the anſwer of the plaintiff in this action, to a bill filed againſt him in the *Exchequer* by the preſent defendant for a diſcovery of the conſideration of the note; the ſubſtance of which was as follows: "That on the 15th of *December* 1774, the defendant *Fenton* purchaſed a quantity of linen of the plaintiff *Trueman*: and it being uſual to abate 5 *l. per cent.* to perſons of the defendant's trade, the price, after ſuch abatement made, amounted to 126 *l.* 18 *s.*—That at the time of the ſale it was agreed, that *one half* of the purchaſe money ſhould be paid *at* the end of *ſix weeks*, and the *other half* at the end of *two months*: And in conſideration thereof, the plaintiff *Trueman* drew two notes on the defendant for 63 *l.* 9 *s.* each, payable to his own order, at *ſix weeks* and *two months* reſpectively. That the defendant accepted the notes, and thereupon the plaintiff gave him a diſcharge for the ſum. He then denied that he had proved or claimed any debt or ſum of money under the commiſſion: But ſet forth, that he acquainted the defendant he was ſurpriſed at his ungenerous

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behaviour in purchaſing ſo large a quantity of linen of him at the eve of his bankruptcy, and informed him he had paid away the above two notes: upon which, the *defendant preſſed* him to take up the two notes, and *propoſed* to give him a ſecurity for *part* of the debt. That afterwards, on the 11th of *February* 1775, the defendant called upon the plaintiff, and voluntarily propoſed to ſecure to him the payment of 67 *l.* in ſatisfaction of his debt, if he would take up the two notes and cancel or deliver them up to the defendant. That the plaintiff agreed to accept this propoſal with the approbation of his attorney, and deſired the note to be made payable to his brother *Joſeph Trueman* or order, three months after date. That he took up the two acceptances and delivered them to the defendant to be cancelled, and *accepted the above note for* 67 l. *in ſatisfaction and diſcharge thereof.* That a commiſſion of bankruptcy iſſued againſt the defendant on the 19th of *January* 1775, and that the bankrupt obtained his certificate on the 17th of *April* following." The queſtion reſerved was, Whether the facts above ſtated ſupported the *merits* of the defendant's plea? If they did not, then a verdict was to be entered for the plaintiff on the general iſſue. But if the *merits* of the ſecond plea ſupported the defendant's caſe, then a verdict was to be entered for the defendant on that plea.

Mr. *Buller* for the plaintiff argued, that the note, though given after the bankruptcy, was in this caſe binding upon the defendant, and therefore the certificate was no bar to the preſent action. 1ſt, Becauſe the goods, though ſold before the bankruptcy, were ſold *on credit*, and not to be paid for till a future day: Therefore, if no *ſecurity* at all had been given, the debt could not have been proved under the commiſſion; becauſe ſuch a caſe does not fall within the proviſions of ſtat. 7 *Geo.* 1. *c.* 31. If not, this is ſimply the caſe of a ſale of goods on future credit, for which the vendor receives a note after the vendee is become bankrupt: Becauſe, the two drafts drawn by the plaintiff on the defendant at the time of the ſale, and accepted by the defendant, could not vary the agreement: It was ſtill a ſale on future credit; and no debt due till after the bankruptcy. Beſides, they were afterwards delivered up. If no debt was due at the time of the bankruptcy, the merits of the plea are clearly not proved: For the merits are, that the debt was *then* due. Now it clearly was not due, and therefore the certificate was no bar to the demand. 2dly, Suppoſing it could be contended, that there was any thing like a debt due before

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before the bankruptcy, yet the plaintiff upon the facts ſtated is ſtill entitled to recover upon the note in queſtion.—The conſideration was for a fair *bonâ fide* debt, without any mixture of fraud or pretence of undue advantage by the plaintiff. On the contrary, there was a groſs fraud on the part of the defendant, in obtaining the goods upon the eve of his becoming bankrupt: and the conviction of ſuch his miſconduct was the inducement with him to offer the ſecurity now in diſpute. If he were to diſcharge the whole original debt, it would not be more than was due, and what in conſcience he ought to pay. But here the plaintiff has agreed to accept much leſs than in conſcience was due to him. If ſo, like every other debt which a man is bound in conſcience to diſcharge, it is a good ground for raiſing an *aſſumpſit*. The ſlighteſt acknowledgment is ſufficient to revive a debt barred by the ſtatute of limitations. So, where a man, after he comes of age, promiſes to pay a debt contracted during his minority, *aſſumpſit* lies. As to the caſe of a promiſe by a bankrupt to pay a debt in conſideration of a creditor's *ſigning* his *certificate*, *that* is made void by the ſtatute 5 *Geo.* 2. *c.* 30. *ſect.* 11. But even *that* would have been a good ground of action *before* the ſtatute; and it is the *only* exception made. The certificate, no doubt, is a proviſion for the *benefit* of the *bankrupt*. But he may wave it; and here he has waved it for a *good* and *valuable conſideration*. If ſo, he is bound by the contract. In addition to this general reaſoning, he cited the caſe of *Lewis* verſus *Chaſe*, 2 *P. Wms.* 620. and *Barnardiſton* verſus *Copeland*, argued in the *Common Pleas*, in *Hilary* and *Eaſter* terms 1761. MSS.

Mr. *Davenport*, *contra*, for the defendant, contended, that the plaintiff had no other remedy for his debt, but by reſorting with the reſt of the creditors to the commiſſion. That the tranſaction, though coloured over, was clearly intended as an evaſion of the bankrupt laws, and therefore manifeſtly illegal. That the plaintiff's taking up the *two drafts*, and accepting another ſecurity ſhort of his real debt, could in no reſpect be a new conſideration to the defendant; becauſe he was at all events diſcharged from *them*, by his certificate: And as to the objection that the original debt itſelf was not within the ſtat. 7 *Geo.* 1. *c.* 31. and therefore could not have been proved under the commiſſion, it clearly might, allowing a rebate of intereſt for the time of the credit given. That the queſtion depended ſolely upon the conſtruction of the bankrupt laws, and particularly the

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ſtat. 5 *Geo.* 2. *c.* 30. by which it was clear, that where ſuch a promiſe or undertaking is made by a bankrupt before his certificate obtained, it is void. That any other conſtruction would open a door to that colluſion reſpecting the certificate which the ſtatute meant to avoid, and at the ſame time be highly injurious to the bankrupt. Therefore he prayed judgment might be entered for the defendant.

Lord MANSFIELD.—The plea put in, in this caſe, is, that the debt was *due* at the time of the act of bankruptcy committed; and on that plea, in point of *form*, there was a ſtrong objection made at the trial, that the allegation was not ſtrictly true: Becauſe at the time of the ſale, credit was given to a future day; which day, as it appeared in evidence, was ſubſequent to the act of bankruptcy committed. To be ſure, on the *form* of the plea, the defendant muſt fail. But I never like to entangle juſtice in matters of form, and to turn parties round upon frivolous objections where I can avoid it. It only tends to the ruin and deſtruction of both. I put it therefore to the counſel on the part of the plaintiff to give up the objection in point of form, and to take the opinion of the court, whether according to the facts and truth of the caſe, the defendant could have pleaded his certificate in bar of the debt in queſtion: And in caſe they had refuſed to do ſo, I ſhould have left it to the jury upon the merits. The counſel for the plaintiff very properly gave up the point of form. The queſtion therefore, upon the caſe reſerved, is worded thus: Whether the facts ſupport the merits of the defendant's plea? That is, Whether on the merits of the caſe properly pleaded, the certificate of the defendant would have been a bar to the plaintiff's action? Now, in this caſe there is no fraud, no oppreſſion, no ſcheme whatſoever on the part of the plaintiff to deceive or impoſe on the defendant; and as to colluſion with reſpect to the certificate, where a creditor exacts terms of his debtor as the conſideration for ſigning his certificate, and obtains money or a part of his debt for ſo doing, the aſſignees may recover it back in an action. But that is not the caſe here. So far from it, the tranſaction itſelf excluded the plaintiff from having any thing to do with the certificate. No man can vote for or againſt the certificate till he has proved his debt. Here the plaintiff delivers up the *two* drafts bearing date *prior* to the act of bankruptcy, and by agreement accepts *one* for little more than half their amount, bearing date *after* the commiſſion of bankruptcy ſued out.

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Moſt clearly therefore he could not have proved *that* note under the commiſſion; and if not, he could have nothing to do with the certificate.—That brings it to the general queſtion, Whether a bankrupt, *after* a commiſſion of bankruptcy ſued out, may not, in conſideration of a debt due *before* the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commiſſion, make ſuch creditor a ſatisfaction in part or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promiſe, it muſt be founded upon the ground of its being *nudum pactum*. As to that, *all* the debts of a bankrupt are due *in conſcience*, notwithſtanding he has obtained his certificate; and there is no honeſt man who does not diſcharge them, if he afterwards has it in his power to do ſo. Though all legal remedy may be gone, the debts are clearly not extinguiſhed in conſcience. How far have the courts of *Equity* gone upon theſe principles? Where a man deviſes his eſtate for payment of his debts, a court of *Equity* ſays, (and a court of law in a caſe properly before them would ſay the ſame,) all debts barred by the ſtatute of limitations ſhall come in and ſhare the benefit of the deviſe; becauſe they are *due* in *conſcience*: Therefore, though barred by law, they ſhall be held to be revived and charged by the bequeſt. What was ſaid in the argument relative to the reviving a promiſe at law, ſo as to take it out of the ſtatute of limitations, is very true. The ſlighteſt acknowlegement has been held ſufficient; as ſaying, "prove your "debt and I will pay you;"—"I am ready to account, but "nothing is due to you:" And much ſlighter acknowledgments than theſe will take a debt out of the ſtatute. So in the caſe of a man who, after he comes of age, promiſes to pay for goods or other things, which, during his minority, one cannot ſay he has *contracted* for, becauſe the law diſables him from making any ſuch contract; but which he has been fairly and honeſtly ſupplied with, and which were not merely to feed his extravagance, but reaſonable for him (under his circumſtances) to have; ſuch promiſe ſhall be binding upon him, and make his former undertaking good.—Let us ſee then what the tranſaction is in the preſent caſe. The bankrupt appears to me to have defrauded the plaintiff, by drawing him in, on the eve of a bankruptcy, to ſell him ſuch a quantity of goods on credit.

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It was groſsly diſhoneſt in him to contract ſuch a debt, at a time when he muſt have known of his own inſolvency, and which it is clear the plaintiff had not the ſmalleſt ſuſpicion of, or he would not have given credit and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquiſhes all hope or chance of benefit from a dividend under the commiſſion, by forbearing to prove his debt; gives up the ſecurities he had received from the bankrupt, and accepts of a note, amounting to little more than half the real debt, in full ſatisfaction of his whole demand. Is that againſt conſcience? Is it not on the contrary a fair conſideration for the note in queſtion? He might foreſee proſpects from the way of life the bankrupt was in, which might enable him to recover this part of his debt, and he takes his chance; for till then, he could get nothing by the mere impriſonment of his perſon. He uſes no threats, no menace, no oppreſſion, no undue influence; but the propoſal firſt moves from, and is the bankrupt's own voluntary requeſt. The ſingle queſtion then is, Whether it is poſſible for the bankrupt in part or for the whole, to revive the old debt? As to that, Mr. Juſtice *Aſton* has ſuggeſted to me the authority of *Bailey* v. *Dillon*, where the court would not hold to ſpecial bail, but thought reviving the old debt was a good conſideration. The two caſes cited by Mr. *Buller* are very material. *Lewis* v. *Chaſe*, 1 *P. Wms.* 620. is much ſtronger than this; for that ſmelt of the *certificate*; and the Lord Chancellor's reaſoning goes fully to the preſent queſtion. Then the caſe of *Barnardiſton* v. *Coupland*, in *C. B.* is in point. Lord Chief Juſtice *Willes* there ſays, "that the *revival of an old debt* is a *ſufficient conſidera-* "*tion.*" That determines the whole caſe. Therefore I am of opinion, that if the plea put in had been *formally* pleaded, the merits of the caſe would not have been ſufficient to bar the plaintiff's demand.

ASTON Juſtice.—As a caſe of conſcience, I am clearly of opinion that the plaintiff is entitled. Wherever a party waves his right to come in under the commiſſion, it is a benefit to the reſt of the creditors. In the caſe of *Bailey* verſus *Dillon*, the court on the laſt day of the term were of opinion, "that the "defendant could not be held to ſpecial bail; yet they would "not ſay that he might not revive the old debt which was clearly "due in conſcience."—A bankrupt may be, and is held to be diſcharged by his certificate from all debts due at the time of the

the commiſſion: But ſtill he may make himſelf liable by a new promiſe. If he could not, the proviſion in the ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 11. by which *every ſecurity* for the *payment of any debt* due *before* the party became bankrupt, as a *conſideration* to a creditor *to ſign his certificate*, is made *void*, would be totally nugatory.—Lord *Mansfield* added that this obſervation was extremely forcible and ſtrong.

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Per Cur. Judgment for the plaintiff.

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Wedneſday, Jan. 29th. *Aſhburſt*, J. abſent.

If upon removal of an order of ſeſſions adjudging that certain perſons ought to be added to a poor-rate, and ordering the rate to be amended accordingly, the ſeſſions omit to ſtate that ſuch perſons had notice or appeared and where heard on the appeal, it is fatal.

Quære whether *perſonal* property is rateable to the poor.

UPON ſhewing cauſe why an order of ſeſſions amending a rate for the relief of the poor of the pariſh of *Andover* ſhould not be quaſhed, the order returned was in ſubſtance as follows:

Upon hearing the appeal of *John Pollen* Eſq; *William Sweetapple*, *William Neale*, *William Pithouſe*, *John Carter*, *Stephen Holeway*, *John Lywood*, *Edward Pearce*, *Thomas Barnes*, and *George Dewar*, Eſq; againſt the rate made for the relief of the poor of the pariſh of *Andover* allowed the 21ſt of *July* laſt, complaining of their being aggrieved by ſuch rate or aſſeſſment, this court is of opinion and doth adjudge, that Mr. *Joſeph Wakeford* is the proprietor of *ſtock in trade* as a draper in the pariſh of *Andover* to the amount of three hundred pounds; and that the profits of ſuch his trade are fifteen pounds *per annum*; and that he ought to be rated towards the relief of the poor of the pariſh of *Andover*, in reſpect of ſuch ſtock and profits, ſeven pence each rate, in the rate appealed againſt.

The order then ſet forth an adjudication of the ſtock in trade and profits of ſix other perſons in like manner; and how much each was to be rated in reſpect thereof, and then proceeded as follows:

And in order to give relief to ſuch appellants in the premiſes, this court does order the ſaid rate ſo appealed from to be *amended*, by putting into ſuch rate, a rate on the ſaid *Joſeph Wakeford* of ſeven pence in reſpect of ſuch his ſtock and profits; and on the ſaid *J. Bunnery* of threepence halfpenny in reſpect of ſuch his ſtock and profits; on the ſaid *Mary Smith* of twopence halfpenny in reſpect of ſuch her ſtock in trade and profits; on the ſaid *Jane Worgan* and *Benjamin Worgan* twopence halfpenny in reſpect of ſuch their ſtock in trade and profits; on the

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said *William Reading* of twopence in respect of such his stock in trade and profits; on the said *Thomas Parry* of twopence in respect of such his stock in trade and profits; and on the said *Peter Parker* of three halfpence in respect of such his stock in trade and profits.

Then it set forth that at an adjournment of the said sessions the justices amended the same rate, &c. and set out the order of amendment *verbatim*.

Mr. *Wallace* and Mr. *Burrough* shewed cause. Mr. *Burrough*'s argument was as follows:

The question now to be decided was at rest for a great number of years: I believe it may be safely asserted that the whole kingdom was satisfied of the legality of including this species of property in rates for the relief of the poor, from the making of the statute of *Elizabeth* to the beginning of the present reign.

Some doubts have of late arisen; but whenever the subject has been agitated, the question has been unfairly stated; for it has ever been put in this manner, "Is personal property rateable "within the meaning of the stat. 43 *Eliz.*?" I have been frequently told that it is not rateable; because there are no such words in the statute. This is certainly true; and was I to ground my argument on the statute only, some difficulties might arise: But every day's observation convinces us, that if we cannot discover the full meaning of the legislature from the words of a statute, there are other sources from whence information may be drawn. I shall endeavour therefore from other sources, and from the expressions of the statute also, to prove, that the legislature meant (and have sufficiently declared their meaning) that every *inhabitant* should be assessed to rates for the relief of the poor; not in respect of his personal property, but his *personal ability*.

This mode of considering the question will obviate one great ground of argument which is urged by the possessor of stock in trade, "That as in early times the quantity of personal property "was very small, it was beneath the attention of the legislature, "and therefore it is to be presumed that the parliament did not "intend it should be rated."

The proposition I hope to maintain being that the inhabitant is liable in respect of his personal ability, the argument alluded to is inapplicable to the question; because if it were possible that a new species of property should arise, which could not be construed to be either real or personal property, the possessor would

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would ſtill be liable to the charge; becauſe ſuch property would increaſe his ability. 1777.

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In order thoroughly to inveſtigate the queſtion, the firſt inquiry ſhall be, whether at the common law there was any method of raiſing ſums for the relief of the poor. I conceive that the *inhabitants* of the pariſhes were at all times, previous to the paſſing the ſtatutes on the ſubject, bound to provide for ſuch of their body as were unable on account of infancy, ſickneſs, and poverty, to maintain themſelves; and that a rate made by the majority of ſuch inhabitants would have been binding on the reſt. It is laid down as clear law in 5 *Co.* 63. in the Chamberlain of *London*'s caſe, "that the inhabitants of a town, "without any cuſtom, may make ordinances or by-laws for the "reparation of the church or a highway, or of any ſuch thing which "is for the general good of the public: And, in ſuch caſe, the "greater part ſhall bind the whole, *without* any *cuſtom*. But if it "be for their own *private profit*, as for the well ordering of their "common of paſture or the like, *there*, *without cuſtom* they *cannot* "make by-laws." In *Moore* 580. in the caſe of *Davenant* and *Hurdis*, *Coke*, who was then Attorney General, contended, that a by-law made by the company of merchant taylors was *bad*, becauſe it was contrary to the nature of a by-law; for (he admitted) that a by-law ought to be made in furtherance of the public good, and the better execution of the laws; and not in prejudice of the ſubject or for private gain. In *Hobart* 212. it is laid down, "that all the pariſhioners or townſmen of one pa-"riſh or town, may make by-laws; for they are by common law "(as it were) incorporate for ſome neceſſities both common and "peculiar to that diſtinct body, as for repairing their church or "the like." It is obſervable, that neither in thoſe books or in any other that I have had recourſe to, is it ſaid that *rates* were ever in fact made for the purpoſe in queſtion; but in all of them mention is particularly made of *by-laws* for repairing the church and highways. It is impoſſible to diſcover with certainty whether any rate was in early times made for this purpoſe or not. It is likely that none was made for a great number of years preceding the Reformation; and that for a plain reaſon: The poor met with ſupport from another quarter. This accounts for the ſilence of the books on this head; but ſince the reaſon aſſigned for the legality of a by-law for the purpoſe of repairing a church or highway is, that it is for the *general good of the public*, I need not attempt to prove,

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that the feeding a ſtarving infant, or reſtoring the ſick to health, would have been more conducive to the general good, than the repairing a dirty road or rebuilding a church ſteeple: For it is from the lower claſs of people that our fleets have always been manned. The induſtry of the poor man has ever ſupplied the kingdom with the neceſſaries of life. I contend then, that a rate which would have been neceſſarily productive of great benefits to ſociety would have been good at the common law. But it muſt be remembered that the *Mirror* tells us, that "at the common law "the poor were maintained by the parſons, vicars, and by the "pariſhioners;" and that this paſſage is expreſsly recognized by Mr. Juſtice *Foſter* and Mr. Juſtice *Wilmot*, in *The King* verſus *Loxdale*, 1 *Bur.* 450. who both agree in admitting it to have been the common law of this country.

This affords a very ſufficient foundation for contending, that *inhabitants of pariſhes* might, before relief was given by ſtatute, *have aſſembled*, and that a *rate* made by the *majority* would have been *binding on the reſt*; becauſe it would have been in furtherance of the public good and the better execution of the laws. Why then was not the common law enforced in the manner I have contended it might have been? The anſwer to this queſtion is, that it is agreed by all who have thoroughly conſidered the matter, that from the early ages of Chriſtianity to the æra of the Reformation, the poor were maintained partly by the church, partly by monaſteries and religious houſes; and where theſe proviſions were defective, the reſt was made up by voluntary contributions. *Shaw's Pariſh Law*, 135. 1 *Nelſon*, 49. 3 *Burn*, 273. 1 *Bur. Rep.* 223. I am well aware that a very learned gentleman, who has obliged the world with his obſervations on the ancient ſtatutes, is of a different opinion *. In his obſervations on the ſtat. 31 *Hen.* 8. *c.* 13. which veſted in the crown the larger monaſteries and confirmed the ſtat. 27 *Hen.* 8. *c.* 28. by which the leſſer monaſteries were granted to King *H.* 8th; there is a paſſage to this effect: "It is generally "ſuppoſed that the diſſolution of the monaſteries occaſioned the "proviſion for the poor in the latter end of Queen *Elizabeth's* "reign, which I ſhould much doubt. In the firſt place, I do not "find that great numbers of poor are ſubſiſted by the monaſteries "which continue ſtill in the Roman Catholic countries. Dr. "*Ducarrel* informs us, that he paid a particular attention to this "point in the province of *Normandy*; and could not diſcover that "the poor had any very conſiderable charity or ſupport from the

* *Barrington* on the ſtatutes, 450.

religious

"religious houſes. Beſides this, the 43 *Eliz.* was near ſixty years "after the diſſolution; and if the poor, at any time, found the "difference, it muſt have been more conſiderably felt in the firſt "years after the ſtatute took place."—When the learned writer penned this obſervation, it is clear that this circumſtance muſt have eſcaped his notice; that the firſt ſtatute for the relief of the poor paſſed in the ſame year in which the leſſer monaſteries were granted to *Hen.* 8. The legiſlature foreſaw that great inconveniences would be felt by the poor at the moment their benefactors were deprived of their poſſeſſions: A law was therefore paſſed to obviate thoſe inconveniences *. The paſſing the ſtatute at this period ſeems beyond a doubt to have eſtabliſhed the fact, that before the Reformation the poor were chiefly ſupported by the monaſteries and other religious houſes.

At the *common law* then, the poor were to be maintained by the *parſon*, *vicar*, and *pariſhioners*; and if the ſtat. 27 *Hen.* 8. *c.* 25. had not made ſome proviſion for their ſupport, the power in the inhabitants of making rates muſt have been executed.

The court will now expect that I ſhould prove that the pariſhioner was liable to this charge in *reſpect of his perſonal ability*. In order to make out this point, I ſhall ſtate to the court the reſolution of the Houſe of Commons in the year 1720, as to the right of election of members to ſerve in parliament, for the borough of *Dorcheſter*. The right of electing burgeſſes for that borough is by this reſolution ſaid to be "in the inhabitants of "the ſaid borough *paying* to church and *poor* in reſpect of their "*perſonal eſtates*, and in ſuch perſons as pay to church and poor "in reſpect of their *real eſtates* within the borough."

The reſolutions of the Houſe of Commons in matters of election are binding authorities: they are expreſsly made ſo by parliament. This reſolution does not create the right to vote, but is declaratory of a right that exiſted before; and which indeed exiſted before the earlieſt parliamentary proviſion for the relief of the poor.

It proves clearly then, that at the time when this right of voting accrued, the inhabitants of certain diſtricts were rateable to the poor in reſpect of their perſonal eſtates. The franchiſe of voting in reſpect of ſuch property could never have exiſted, unleſs the inhabitant had been aſſeſſable to the poor firſt. Before the Reformation then, when the firſt ſtatute on the ſubject paſſed, the inhabitants of *Dorcheſter* were aſſeſſable to the relief of the poor for their *perſonal eſtates*.

* Stat. 27 *Hen.* 8. *c.* 25.

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In the next place I contend, that the ſeveral ſtatutes upon the ſubject were made in *confirmation* of the *common law*; and that as ſeveral of theſe ſtatutes expreſsly threw the burthen on all who were able to contribute, they have explained what partly indeed wanted explanation; that all who were able to contribute were liable to the rate at common law, and that it was totally immaterial whether the ability of the inhabitant aroſe from the enjoyment of *real* or *perſonal* property.

I will now ſhortly ſtate the ſeveral ſtatutes from the Reformation to the 39 *Eliz.* which will, I apprehend, prove, that I have very ſufficient grounds for conſidering them as confirmative of the common law. The firſt in order of time is, ſtat. 27 *H.* 8. *c.* 25. By this act pariſhes were to find and keep every aged poor and impotent perſon who was born or had dwelt three years within the ſame, by way of voluntary and charitable alms, to be gathered of the good Chriſtian people within the pariſh on *Sundays* and other holidays. The 2*d* is ſtat. 1 *Ed.* 6. *c.* 3. *ſect.* 14, which enacts, that lame, ſore, and impotent perſons were to be taken care of where they were born or had been moſt converſant for three years. It directs that cottages ſhould be provided for them, at the coſts of ſuch places, and they were there to be relieved and cured by the devotion of good people.

The parliament, having at theſe periods in their memory the examples of the former proprietors of the religious houſes who had voluntarily ſupported the poor, imagined it would be ſufficient to recommend charity to the inhabitants of pariſhes, and ſuppoſed compulſive ſteps would not be neceſſary.

The next ſtatute is the 5 & 6 *Ed.* 6. *c.* 2. which directs, "that every year, in *Whitſun-week*, the miniſter and church-"wardens in every pariſh after ſervice ſhould appoint two in-"habitants to the office of collectors, who on the next *Sunday* "were to aſk and demand of every man and woman, what they "were contented to give weekly; and if any perſon, being *able* "to further this charitable work, did obſtinately refuſe to give "towards the help of the poor, the miniſter was to exhort "him; and if not then perſuaded, the biſhop was to ſend for "him, and to take order for his reformation." If neither the exhortations of the miniſter, nor the perſuaſion of the biſhop proved effectual, the biſhop by the next ſtat. 5 *Eliz.* *c.* 3. was to bind the party refuſing over to the ſeſſions, where he was to be gently perſuaded; and if he ſtill continued obſtinate, the juſtices, with the churchwardens or one of them, were to tax

him according to their diſcretions in a weekly ſum; and on re- 1777.
fuſal to pay, he was to be committed to gaol.

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There is not any thing in theſe laws from which it can be inferred that the charge was intended to be limited to perſons of any other deſcription than that of "*inhabitants able to contribute.*" The three laſt were repealed by 14 *Eliz. c.* 5. which enacts "that juſtices of the peace, in their diviſion, ſhould tax all "and every *inhabitant* in every place known; they were to appoint "collectors and overſeers; and if any perſon able to further this "charitable work obſtinately refuſed to give, he was to be brought "before the juſtices to ſhew the cauſe of his refuſal; and if he "did not obey their order they were to commit him to gaol, un-"til he was contented with it." This ſtatute was defective in one particular; it did not give authority to the overſeers to raiſe a ſtock for the employment of ſuch poor as could not find work. The ſtat. 18 *Eliz. c.* 3. therefore directed, that in all places where the juſtices in *Eaſter* ſeſſions ſhould think meet, there ſhould be provided, of all the inhabitants to be taxed and gathered, a competent ſtock of wool and other things as the country is moſt meet for.

The two laſt ſtatutes 14 & 18 *Eliz.* were the laſt that were in force before the paſſing the 39 *Eliz.* and it is material to obſerve, that though a rate on any *inhabitant*, in reſpect of any property which created ability, would have been good; yet that a rate on a mere *occupier of land*, who was *not* alſo an *inhabitant*, would have been *illegal*; becauſe both theſe ſtatutes confined the charge to *inhabitants only*. I muſt obſerve here alſo, that there is not the leaſt ground for contending that the parliament meant to confine the charge to inhabitants who poſſeſſed any particular ſpecies of property. Whether *viſibly able* or not, was the only matter to be attended to. And it was as much in the power of the pariſh officer then, as it is now, to diſcover a man's ability when it aroſe from *perſonal* property, as when it aroſe from real property.

I ſhall now endeavour to convince the court, that all, who were aſſeſſable under theſe laws, were aſſeſſable alſo under the ſtat. 39 *Eliz.* and ſtill continue to be ſo under ſtat. 43 *Eliz.* The legiſlature did indeed, by the firſt of thoſe ſtatutes, make the occupier of land, who was not alſo an inhabitant, liable to contribute—and he continues to be ſo under the latter of them. If it was not clear beyond a poſſibility of contradiction, that the parliament

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by theſe and the former ſtatutes meant that *general ability* was to be the *guide* to the overſeers in framing their rates; I might fairly contend that the parliament would in the ſtat. 39 and 43 *Eliz.* have dropped the term *inhabitant*: It is of no uſe, if the perſons are to be rated only in reſpect of the land; for the word "*occupier*" includes every poſſible caſe. The ſtat. 39 *Eliz.* then, firſt made the occupier liable. The idea of ability was ſtill retained; the act declared that the neceſſary ſums ſhould be raiſed "by taxation of every *inhabitant and of every occupier of lands* in "the pariſh, to be gathered out of the ſame pariſh according to "the *ability of the* ſame." The parliament had undoubtedly before them the former laws: They perceived that it was in the power of a crafty landholder to exempt himſelf from the charge, by living out of the pariſh; they meant therefore to relieve the inhabitants, by introducing other perſons who in juſtice ought to ſhare the burthen; becauſe they had been benefited by the labour of thoſe perſons for whoſe relief parochial rates were made. Under this law the *inhabitant* was rateable for his *perſonal ability*; the *occupier* for his *land*.

In the conſtruction of ſtatutes made in *pari materiâ* the law ſays, that though made at different times, or even expired and not referring to each other, they ſhall be taken and conſtrued together as one ſyſtem, and as explanatory of each other.—Whilſt I was reflecting on this rule, it occurred to me that in order to diſcover the full meaning of the ſtat. 43 *Eliz.* it would be neceſſary (after having found out how the law preceding that ſtatute ſtood) to procure anſwers to theſe queſtions. Was there any doubt of the meaning of that law? Was it expired? Does any thing intervene to ſhew that an alteration was deſigned? Is there any preamble to the 43 *Eliz. c.* 2. reciting the inconvenience of the former laws? Are there words in the enacting branch of the new law manifeſtly contrary to, and ſubverſive of, the old? The anſwers to theſe queſtions diſpelled all my doubts. The meaning of the former law was plain. The ſtatute was expired. Nothing intervenes to ſhew that an alteration was deſigned. There is not any preamble reciting the inconvenience of the former laws, nor are there any words in the *new* law contrary to, or ſubverſive of the *old*. What then is the legal conſequence? Courts of Juſtice muſt pronounce that the parliament meant only to revive the old law: Conſequently the new law muſt have the ſame conſtruction: And if a rate under the ſtat. 39 *Eliz.* would have been good upon an *inhabitant* in reſpect of his *perſonal ability*, it is clearly good under the ſtat. 43 *Eliz.*—On the expiration

expiration of the ſtat. 39 *Eliz.* the parliament paſſed the law on which the queſtion ariſes. If this doubt had been ſtarted whilſt the former of theſe ſtatutes was in force, the court could not have avoided giving judgment in favour of the landholders. If I am right in this point, the landholders are now ſecure of a deciſion in their favour: Becauſe the two laws in every material circumſtance are ſimilar. The title of the two laws is the ſame; they begin with the ſame words. If the parliament had deſigned to impoſe the whole burthen on the occupiers of the ſeveral ſpecies of property enumerated in the ſtat. 43 *Eliz. c.* 2. and to have exempted the inhabitant, there would have been a preamble reciting the inconvenience of the former law, which would have ſaid, that the perſonal ability of each inhabitant was not diſcoverable: but as the parliament did not mean to make any alteration in this reſpect, nothing of this kind is to be found in the ſtatute. All who read the two laws muſt agree with Dr. *Burn*, "that the ſtat. 43 *Eliz.* is but a re-enacting of former pro-"viſions with very little alteration," 3 *Burn.* 479.—*Hiſt. Poor Laws* 91. By the ſtat. 43 *Eliz.* the rate is to be made by taxation of every inhabitant, parſon, vicar, and other, and of every occupier of lands, houſes, tithes impropriate, propriations of tithes, coalmines, or ſaleable underwoods. Some few words are added after the word "lands," which perhaps were not neceſſary, as the word land is of a very extenſive ſignification, and would have compriſed almoſt all (if not all) the property ſpecified by thoſe additional words. Near the end of the firſt ſection is introduced the idea of ability, which was uſed in the ſtatutes preceding the 39 *Eliz.* and in every one of them confined to the word inhabitant. The tax is to be gathered out of the pariſh according to the ability of the ſame pariſh. Theſe words having been in all the former laws coupled to the term inhabitant, muſt be conſtrued as referring to, and explanatory of that word in the preſent ſtatute. At the moſt, it can only be uſed in the conſtruction of inhabitants, parſon, vicar, and others; becauſe the words "occupiers of lands, houſes, *&c.*" of themſelves authoriſe a rate on the occupier, for the value of that property; The ſubſequent words therefore have no force if uſed as explanatory of the ſecond branch of the ſentence; but they explain the former branch to mean *this*; the inhabitant ſhall be rated according to his ability, when the property which creates that ability is locally ſituate within the pariſh.

It is ſettled that an act of parliament muſt if poſſible be ſo conſtrued, as to give every part ſome effect; becauſe the legiſlature cannot

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cannot be ſuppoſed to have uſed unneceſſary words. If the ſtatute be conſtrued in the way I contend it ought to be, every part will have ſome effect; if otherwiſe, the words I have now endeavoured to explain are not of the leaſt uſe.

The ſtatute 43 *Eliz.* is miſprinted both in the *Poor Laws*, and I believe in other books. They have it in this manner, "every "inhabitant, parſon, vicar and other, and of every *other* occupier of lands," *&c.*; but in *Roſtall*, *Ruffhead*, *Pickering* and *Cay*, the words are, "every inhabitant, parſon, vicar, and other, "and of every *occupier* of land, *&c.*" But for the ſake of the argument, I beg to conſider, how the ſtat. 43 *Eliz.* ought to have been conſtrued if it had introduced a new law. And here it is clear, that the preſumption ought to be that the parliament intended to throw the burthen on thoſe who in juſtice ought to bear it. Who then are theſe perſons? The clergy, the farmer, the manufacturer, the tradeſman, and indeed every other perſon who is indebted to the poor man for his labour, and is of ability to make ſome return for it.

It muſt be preſumed that the legiſlature of this country, whenever they impoſe a charge on the people, are directed by the well known rule of the common law, *qui ſentiunt commodum ſentire debent et onus.* The burthen ought in the caſe now under conſideration to be general; the expreſſions of the ſtatute extend to, and fairly juſtify a rate on the perſons of all who reap this advantage, provided the property, in reſpect of which the perſon is taxed, lies *within the pariſh* in which the proprietor lives.

It will be very material in this part of the argument to ſhew, that the parliament ſo long ago as the year 1670. 22 *Car.* 2. thought perſonal property liable to this charge within the ſtat. 43 of *Eliz.* By the ſtat. 22 *Car.* 2. *c.* 12. called an additional act for the better repairing of highways and bridges, *ſect.* 10. it is enacted, "that where the juſtices of the peace at "their quarter ſeſſions ſhall be fully ſatisfied that the common "highways, cauſeways, or bridges, cannot be ſufficiently "amended by means of the laws now in force, without the help "of that act, in all ſuch caſes one or more aſſeſſment or aſſeſſments upon all and every the *inhabitants*, owners, and *occupiers* "of lands, houſes, tenements, and hereditaments, or *any perſonal* "*eſtate* USUALLY *rateable to the poor* within any ſuch pariſh, "ſhall be made, levied, collected, and allowed, by ſuch perſons "and in ſuch manner as the juſtices in ſeſſions ſhould think "meet."

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Independent of authorities, I conceive that a rate on the perſonal ability of the inhabitant, is within the words and meaning of the ſtat. 43 *Eliz.* But if the court has any doubt of the conſtruction of the ſtatute when conſidered by itſelf, without attention to the authorities; yet no doubt can remain after a ſerious conſideration of the caſes and opinions to be found in the books. The firſt in order of time is the anſwer to the 18th queſtion in the reſolutions mentioned in *Dalton*: The anſwer expreſsly ſays, "that the *perſonal viſible ability* of the inhabitant "may be rated." Some one has endeavoured to deſtroy the authority of theſe reſolutions by prefixing a note to them; in which it is ſaid, that though they were the opinion of Sir *Robert Heath*, yet the judges differing from Sir *Robert* in ſome things, they never came to a reſolution. This note I apprehend does not deſerve any attention; becauſe the reſolutions are expreſsly recognized by *Hutton* and *Croke*, in Sir *Anthony Earby*'s caſe, 2 *Bulſ.* 254. Theſe judges could not be miſtaken; for it appears in *Dugdale's Chronica Series*, page 104 & 108. that Sir *Robert Heath* was made judge in 1628, and *Hutton* in 1617. They were both on the bench when Sir *Robert* ſubmitted his opinion to the twelve judges, and they both expreſsly ſay (and they could not be miſtaken) "that the twelve judges agreed "to the reſolutions." In Sir *Anthony Earby*'s caſe, *Hutton* and *Croke* determine a caſe ſubmitted to them on the authority of theſe reſolutions, and they both agree in ſaying "that the aſ-"ſeſſments for the relief of the poor ought to be made according "to their *viſible eſtate real and perſonal.*" *Dalton* was of the ſame opinion alſo, as appears in his *Juſtice*, *c.* 73. *page* 165 & 185. He ſays, "the moſt reaſonable way of taxing land is ac-"cording to the pound rate; and where a perſonal eſtate, as "goods, money, &c. are taxed, it ought to be in the ſame pro-"portion as the lands, *viz.* the value of 100 *l.* at 5 *per cent.*" The next caſe is the *King* and St. *Leonard's, Shoreditch*, 10 *W.* 3. *Salk.* 483. 12 *Mod.* 212. *p.* 21. This is a deciſion in point. And though the court ſhould think that the reſolution of the twelve judges in *Dalton*, the opinion of *Hutton* and *Croke* on Sir *Anthony Earby*'s caſe, and the opinion of *Dalton* alſo ought not to have weight in this deciſion, ſtill this caſe is free from every objection. The court of *King's Bench*, after argument on this queſtion, determined, that *perſonal* property was aſſeſſable. There had been two rates made in this caſe; in the firſt the overſeers had *omitted* to rate *perſonal* property: On appeal to the

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sessions the rate was for that reason *quashed*, and a new rate ordered on real and *personal* estates. The court of *King's Bench* confirmed that order. As to the second rate, which was made in consequence of the order of sessions, the churchwardens had in it taxed real estate ten times more in proportion than personal estate. On appeal to the sessions, the sessions quashed this rate likewise, and the court of *King's Bench* confirmed this order also. In the *Queen* and *Barkin*, 2 *Ld. Raym.* 1280. three judges of the court of *King's Bench*, on a question submitted to that court, were of opinion, that a farmer for his stock was not taxable. Lord *Holt* thought he was; but they all agreed in the only point material to this question, that a tradesman was rateable for his stock. Lord *Hale*, who had well considered the subject, in his scheme for the relief of the poor says, "it is very plain that stocks are as well by law rateable "as lands, both to the relief and raising a stock for the poor." In *The King* v. *Clerkenwell*, *Foley* 23. *Hil.* 2 *G.* 1. an order confirming a poor rate which was made according to the land-tax was quashed, such taxation being unequal; because personal estate in the public funds is not chargeable to the land-tax, tho' it is to the poor.

To these determinations and opinions may be added the sentiments of all the writers on the poor laws. They uniformly agree in admitting personal property to be liable to the charge. 2 *Nelf.* 53. 2 *Shaw's Justice* 149, 152. *Shaw's Parish Law* 243. 248. Dr. *Burn*, 3d vol. 481. In *Viner's Abridgment*, tit. Poor, E. 8. there are several notes to this purpose; "a shop-keeper "shall be charged to the poor-rates for the goods in his shop."

Within a few years several attempts have been made to obtain the decision of this court on this subject: But it has unfortunately happened, that the question has not been fairly before the court in any one of the cases from the sessions. This was the fate of *The King* v. *Canterbury*, *The King* v. *Whitney*, and *The King* v. *Ringwood*.* In the first of these, which is in 4 *Burr.* 2293, Mr. Justice *Aston* is reported to have doubted on the subject, and to have said, it was odd that ever since the cause in *Bulstrode*, which was above 140 years ago, the rule said to be then settled should never have been carried into execution. But it is a fact, that for a long time personal property has been rated in the parish of *Andover*, from whence this question comes. In many other parts of the kingdom the same practice has prevailed; at *Alton* in *Hampshire*, at *Lynn*, *Norwich*, in many parishes

* *Supra*, 326.

pariſhes in the city of *London*, at *Bradford*, *Trowbridge*, *Warminſter*, *Frome*, and other Towns in *Wiltſhire*. I am told likewiſe that it is the ſame in many of the large towns in the North. In 4 *Burr.* 2295, the reporter mentions the caſe of *The King* verſus *The churchwardens and overſeers of Ringwood*; and he ſays, "that this queſtion was pretty nearly, if not quite ſettled "by that caſe."—But this is a miſtake; for that caſe turned on the determination in *The King* v. *Whitney*; the ſeſſions had quaſhed, where they ought to have amended the rate according to the directions of ſtat. 17 *Geo.* 2.

As to the difficulties which it is ſaid will attend the rating this property, and the inconveniences which it is ſuppoſed will enſue from a determination in favour of the landholders; namely, that the overſeers cannot know what property a man has, or what is the yearly produce of ſuch property: the anſwer is that thoſe are inquiries not to be made here; they are mere matters of fact, and muſt be determined below. In the preſent caſe, the appellants have ſatisfied the juſtices that the ſeveral perſons whoſe names are added to the rate, did poſſeſs certain quantities of property; and that they had the moderate yearly profit of five *per cent.* upon it. It is frequently ſaid, that an overſeer cannot juſtify entering the houſe of a tradeſman, nor can inſiſt on ſeeing his books, for the purpoſe of diſcovering his ability to contribute. I admit that no expreſs authority is given by the ſtatute, nor was there any whilſt the former laws were in force; but then it muſt on the other hand be admitted, that no authority is given by that act, nor had the overſeers any power under the old law, to enter on the *land*, or to take any neceſſary ſtep towards obtaining a knowledge of the value of the occupier's landed property. This argument therefore, if it has any effect, muſt prove that no tax whatever can be impoſed either on the tradeſman's profits, or on any one of the kinds of property enumerated in the act of parliament. How can the value of either lands or coal-mines be aſcertained without an entry on the lands, *&c.*?

A ſecond argument is, that no fair rate can be made without deducting debts. But this is begging the queſtion; for the tradeſman ought firſt to prove that the law intended debts ſhould be deducted. Many of the opinions that have been ſtated to-day, ſay that the viſible perſonal ability is to be rated: This ſeems to me to exclude debts. There is no deciſion that ſays, debts ought to be deducted. If the law be ſo, does it not

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extend alſo to real property? Are not mortgages to be deducted? I cannot ſee why there ſhould be all this anxiety for the tradeſman, and no attention to the caſe of the landholders. Whether the debts are to be deducted or not, is immaterial to the deciſion of the preſent caſe; becauſe in this order, which I conceive we are bound to adhere to as much as a ſpecial verdict, the profits are found to be *5 per cent*: and profit means a clear ſum after deducting all charges. Since then, according to this mode of reaſoning, neither the value of land or perſonal property can be aſcertained with certainty; it will be neceſſary to conſider, how it has happened that any proviſion has been made for the poor, and why all mankind have ſubmitted and from time to time paid their ſhares of the aſſeſſments. The overſeers and the inhabitants have proceeded amicably; and that for this reaſon; unleſs they had done ſo, the poor muſt have ſtarved.

It is probable that in early times they aſſembled in veſtry, and agreed what each individual's portion of the charge ſhould be. It will be ſaid perhaps that this being once done, as far as it concerned land, it might ever after be uſed as evidence of value:—This is no anſwer; becauſe lands muſt be rated according to improvements. One man's land may continue in the ſame ſtate:—Another's may be worth one third more Large tracts, which for a long period may have been in the occupation of one man, may by private conveyances be transferred to ten. How then can an overſeer know, what portion of this tract each of the ten occupies? Nothing could be done in ſuch a caſe, without admiſſions from the mouth of the occupier.—Theſe cannot be forced from him. The caſe I have now put is a very common one ſince the frequency of incloſing pariſhes. Lands, the value of which before was known, are, under incloſing acts, conveyed to different perſons. Large pariſhes, which for a century have been occupied by two or three farmers only, are divided amongſt a dozen proprietors. What method has the overſeer of diſcovering the value of each of theſe portions? It can only be done by the parties admitting them to be of ſome certain value. If the party is obſtinate, the overſeer muſt rate him at diſcretion: And why ſhould not the obſtinate tradeſman be liable to this inconvenience.

The moment the court has determined that the order of ſeſſions is right, the inhabitants of pariſhes muſt aſſemble, and by mutual conceſſions agree how the charge ſhall be divided. An honeſt man will never object to giving in a fair account of his

his property; others will perhaps be backward, and attempt to compel their neighbours to ſhare what ought to come from their purſes. If this ſhould be ſo, the overſeers muſt get the beſt information they can: And they will always (as the overſeers in the preſent caſe have done) value the profits of their trade at a much lower ſum, than in the opinion of every one they amount to. If any one thinks himſelf aggrieved by ſuch a rate, he muſt appeal and ſatisfy the juſtices that he is injured. The juſtices have power to give him redreſs, and to order him his coſts. On the other hand, a deciſion that this property is not rateable, will ruin the landholders in the populous towns in different parts of the kingdom. It will alſo deprive many of the people of *England* of the moſt valuable privilege they at preſent enjoy; that of ſaying who ſhall repreſent them in the Houſe of Commons. In the borough of *Dorcheſter* this muſt neceſſarily be the caſe. It was the opinion of a very learned man, Lord *Vaughan*, that where the law is known and clear, though it be unequitable and inconvenient, the judges muſt determine as the law is, without regarding the unequitableneſs or inconveniency. Thoſe defects, if they happen in the law, can only be remedied by parliament; therefore we find many ſtatutes repealed, and laws abrogated by parliament as inconvenient, which, before ſuch repeal or abrogation, were in the courts of law to be ſtrictly obſerved. But where the law is doubtful, and not clear, the judges ought to interpret the law as is moſt conſonant to equity, and leaſt inconvenient.

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In the preſent caſe the law is clear: but if it were not ſo, it ſtill would be moſt conſonant to equity, that all ſhould contribute to the relief of the poor who are of ability to do ſo. I hope therefore that the order of ſeſſions will be affirmed.

Mr. *Dunning contra*, objected that the order on the face of it was bad, inaſmuch as it did not appear, that the ſeveral perſons whoſe names were added to the rate by order of the quarter ſeſſions, had *notice* of the appeal, or litigated the queſtion at the ſeſſions. They were therefore without redreſs; for it neceſſarily precluded them from their appeal. The ſeſſions as to them made an original rate, without having given them an opportunity of defending themſelves.

The Court held this to be a fatal objection; and therefore that the order of ſeſſions ought to be quaſhed.

Lord *Mansfield*, upon the general point, ſaid, it is a very different queſtion, whether perſonal eſtate is to be rated to the

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extent in which it has been argued to day, or not to be rated at all in any ſhape, or under any circumſtances. It would make the poor laws very oppreſſive, if a man is to be taxed to the extent of his whole perſonal eſtate and income. In that caſe, every man who has money in the funds, would be liable: Lawyers for their fees; ſoldiers for their pay, *&c.* But where men are occupiers of houſes, and have ſtock in trade, whether ſuch ſtock in trade may be taken into conſideration is a very different queſtion. Some perſonal eſtate may be rateable: But it muſt be *local viſible* property *within* the *pariſh*. The general queſtion is too extravagant. It would be material to ſtate what has been the cuſtom of rating. If the uſage ſhould be to take in ſtock in trade, there would be very good right to ſupport it. Let them therefore try it on the ſpecial circumſtances of the caſe.

ASTON Juſtice.—From the caſe in the 9th *Car.* 1. there are a great many which ſay that the local viſible property may be rated—but the queſtion is, how it muſt be done. Suppoſe it were done by the overſeers in the manner done here: if notice is given to the ſeveral perſons rated, and they think themſelves over-rated, they have an appeal to the ſeſſions. So if a houſe has been uſually rated for the houſe and ſtock in trade altogether; the rate is ſo ſpecified; and if the perſon has an objection, becauſe he is mounted too high, on an appeal, all that is a matter to be laid before the juſtices at ſeſſions, who act as jurymen with reſpect to the fact, and judges as to the deciſion. Then the immediate point ſpecified in the appeal is produced. For notwithſtanding the uſage, if upon the general queſtion, which is what they are now aiming at, it ſhould turn out to be the law that perſonal property is rateable, if that is the law, it muſt be rated then; though it never was ſo before.—I ſhould think if the fact was fairly ſtated on an appeal, perſonal property, if by law rateable, might be called upon notwithſtanding the uſage.——*Per Cur.* Rule abſolute.

Tueſday, Feb. 4th.

Mr. Juſtice *Aſton* abſent.

If money be paid by miſtake to an agent, and placed by him to the account of his principal, but *not paid over*, money had and received to the uſe of the perſon ſo paying it by miſtake will lie againſt the agent.—The mere *paſſing* ſuch money in *account* or *making reſt*, without any new credit given, freſh bills accepted or further ſum advanced for the principal in conſequence of it, is not equivalent to a payment of it over.

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UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* read his report as follows:

This

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BULLER *verſus* HARRISON.

This was an action for money had and received, brought by the plaintiff againſt the defendant, to recover back a ſum of 2,100*l.* paid him as due upon a policy of inſurance, as *agent* for the inſured, Meſſrs. *Ludlow* and *Shaw*, reſident at *New York*. This ſum the plaintiff had paid, thinking the loſs was fair. Notice of the loſs was given by the defendant to the plaintiff on the 20th of *April*. Part of the money was paid at that time, and the remainder on the 6th of *May* following; on which day the defendant paſſed the whole ſum in his account with Meſſrs. *Ludlow* and *Shaw*, and gave credit to them for it againſt a ſum of 3,000 *l.* in which they ſtood indebted to him. On the 17th of *May*, notice was given by the plaintiff to the defendant that it was a foul loſs. At this time, nothing had happened to alter the ſituation of the defendant, or to make it different from what it was on the 20th of *April*. He had accepted no freſh bills, advanced no ſum of money, nor given any new credit to his principals; but affairs between them and him remained preciſely in the ſame ſituation as on the 20th of *April*. The queſtion at the trial was, whether this action could be maintained againſt the defendant, as *agent* of the inſured; which depended on this; whether the defendant's having placed this money to the account of his principals, in the manner before ſtated, was equivalent to a payment of it over.

In general the principle of law is clear; that if money be miſpaid to an agent expreſsly for the uſe of his principal, and the agent has paid it over, he is not liable in an action by the perſon who miſpaid it: becauſe it is juſt, that one man ſhould not be a loſer by the miſtake of another; and the perſon who made the miſtake is not without redreſs, but has his remedy over againſt the principal. On the other hand it is juſt, that as the agent ought not to loſe, he ſhould not be a gainer by the miſtake. And therefore, if after the payment ſo made to him, and before he has paid the money over to his principal, the perſon corrects the miſtake; the agent cannot afterwards pay it over to his principal, without making himſelf liable to the real owner for the amount. But the preſent caſe turns upon this; that the agent was preciſely in the ſame ſituation at the time the miſtake was diſcovered, as before. At the trial I inclined to think the plaintiff ought to recover; but did not direct the jury; and they found for the defendant. I am ſatisfied I miſtook in leaving it open to the jury: For it is clearly a queſtion of law, not a matter of fact: And in conſcience the defendant is not en-

1777. titled to retain the money. Therefore I ſhould have left it to the jury in this manner; if you are ſatisfied that the money was paid by miſtake, and the defendant's ſituation not altered by any new circumſtance ſince, but that every thing remained in the ſame ſtate as it was on the 20th of *April*, you ought to find for the plaintiff.

BULLER *verſus* HARRISON.

Mr. *Bearcroft* and Mr. *Davenport*, who ſhewed cauſe, inſiſted that the defendant had a right to retain the money in queſtion. That the ſhip, which was the ſubject of inſurance, was ſuppoſed to be ſea-worthy; and the object of the voyage was to ſatisfy 2,100 *l.* part of the debt due to the defendant, their factor. They had inſured, therefore, accordingly, and drawn bills on *Holland* to that amount; which bills would undoubtedly have been honoured, if the ſhip had come ſafe. That upon the ſhip being loſt, and the money due on the inſurance coming into the defendant's hands; he had given his principals credit for ſo much on account, and had ſtruck the balance. This by the verdict the jury clearly had conſidered as a *reſt* in the books of the defendant, and not a mere placing to account; and therefore was to all intents and purpoſes equivalent to a payment over. As to the fact of there being no change in the ſituation of the defendant and his principals, becauſe the debt was not increaſed, there was no neceſſity that it ſhould be increaſed; or that any new credit ſhould be given. It was ſufficient that the money was fully carried to account by the defendant, and conſidered by him as his property at the time, and for eleven days after. It might be too, that under this idea he was lulled into ſecurity, and did not take any means during that interval, to get the money from *New York*. If ſo, he would at leaſt be a ſufferer by the delay, if the verdict ſhould be ſet aſide.

Mr. *Wallace* and Mr. *Dunning* were in ſupport of the rule; but Lord *Mansfield* thought the caſe ſo clear, that his lordſhip ſtopped Mr. *Dunning*, as being unneceſſary to give himſelf any trouble.

Lord MANSFIELD.—I am very glad this motion has been made: for I deſire nothing ſo much as that all queſtions of mercantile law ſhould be fully ſettled and aſcertained; and it is of much more conſequence that they ſhould be ſo, than which way the deciſion is. The jury were embarraſſed on the queſtion whether this was a *payment over*. To many purpoſes it would be. It is now argued, that this is not a *mere placing* to *account*, but a *making reſt*. If it were, it would not vary the caſe a ſtraw.

I verily

I verily believe the jury were entangled in conſidering it as a payment over. There is no imputation upon a man who truſts to a miſrepreſentation of the inſured. It is greatly to his honour; but it makes it of conſequence to him to know, how far his remedy goes if he is impoſed upon. The whole queſtion at the trial was, whether the defendant, who was an agent, had paid the money over. Now, the law is clear, that if an agent pay over money which has been paid to him by miſtake, he does no wrong; and the plaintiff muſt call on the principal; And in the caſe of *Muilman* verſus ——, where it appeared that the money was paid over, the plaintiff was nonſuited. But, on the other hand, ſhall a man, though innocent, gain by a miſtake, or be in a better ſituation than if the miſtake had not happened? Certainly not. In this caſe, there was no new credit, no acceptance of new bills, no freſh goods bought or money advanced. In ſhort, no alteration in the ſituation which the defendant and his principals ſtood in towards each other on the 20th of *April*. What then is the caſe? The defendant has truſted *Ludlow* and *Co.* and given them credit. He trafficks to the country where they live, and has agents there who know how to get the money back. The plaintiff is a ſtranger to them and never heard of their names. Is it conſcientious then, that the defendant ſhould keep money which he has got by their miſrepreſentation, and ſhould ſay, though there is no alteration in my account with my principal, this is a bit, I have got the money and I will keep it? If there had been any new credit given, it would have been proper to have left it to the jury to ſay, whether any prejudice had happened to the defendant by means of this payment: But here no prejudice at all is proved, and none is to be inferred. Under theſe circumſtance I think (and Mr. Juſtice *Aſton* with whom I have talked the matter over is of the ſame opinion) that the defendant has no defence in point of law, and in point of equity and conſcience he ought not to retain the money in queſtion.

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Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

Per Cur. Rule for a new trial abſolute.

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Same day.

EVANS *et al' verſus* MANN.

Aſton, Juſtice abſent: *Aſſignees*, of a bankrupt, in *aſſumpſit* againſt the vendee of goods ſold by the bankrupt *after* the commiſſion, need not name themſelves aſſignees in the declaration: *Secus*, if on a contract made by the bankrupt *before* the commiſſion.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* reported as follows: The ſingle point ſaved in this caſe was, whether the plaintiffs, who are aſſignees under a commiſſion of bankrupt againſt one —— a bankrupt, ſhould have ſtated themſelves to be aſſignees in the declaration. This was an action for *goods ſold* and delivered: There were other counts for *money had and received*; and on an *account ſtated*. The caſe proved at the trial was, that the bankrupt ſome years after his bankruptcy, and before he had obtained his certificate, continued to carry on his trade as a lighterman, in buying and ſelling lighters; and amongſt others ſold a lighter to the defendant, who paid him 30 *l.* part of the purchaſe money at the time of the ſale. Afterwards the plaintiffs, hearing of the ſale, applied to the defendant, and inſiſted upon having the lighter delivered up to them, or the purchaſe money paid; but after ſome converſation it was agreed between them, that the defendant ſhould keep the lighter, and pay the reſidue of the purchaſe money only to the plaintiffs, after deducting the 30 *l.* paid to the bankrupt; and for this reſidue the action was brought. At the trial, the counſel for the defendant objected, that the action could not be maintained; becauſe the plaintiffs did not ſue as aſſignees, nor ſtate themſelves as ſuch in the declaration.—I overruled the objection; but gave the defendant leave to move for a new trial; and if the court ſhould be of opinion that the objection was well founded, then a nonſuit was to be entered.

Mr. *Wallace* and Mr. *Buller*, who ſhewed cauſe, argued, that this being a contract to which the plaintiffs as aſſignees of the bankrupt were perſonally privy and parties, there was no occaſion for them to ſtate their title in the declaration; but they had a right to ſue in their own names, as an executor or adminiſtrator, who is party to a contract relative to the goods of the deceaſed, may do.

Mr. *Dunning* and Mr. *Morgan contra*, contended, that the action being brought in right of the bankrupt, the plaintiffs ought to have ſet out their title in the declaration; otherwiſe the defendant could not know what anſwer to make to the action. Beſides, it might be that he had a ſett-off againſt the

bankrupt; which clearly could not have been pleaded to this action. As to an executor or adminiſtrator ſuing in his own right upon a contract relative to the goods of the deceaſed, the law was clearly ſettled, that wherever an executor ſues in right of his teſtator, he muſt name himſelf executor; and cited 5 *Co.* 31. *F. N. B.* 119. *M. Cro. Car.* 225. 1 *Lev.* 250. *Regiſtr. Brev.* 143. 2 *Stra.* 1,271. *Wilſ.* 171. S. C. 1777. EVANS *verſus* MANN.

Lord MANSFIELD.—This is an action for goods ſold and delivered. The facts of the caſe are, that the bankrupt, after his bankruptcy, and before he had obtained his certificate, carried on his trade as a lighterman, and both built and ſold lighters. He ſold one to the defendant who paid him part of the purchaſe money: After which the aſſignees apply to the defendant for the value of the lighter; and ſo far affirm the contract as to enter into an agreement, by which they are content to be paid the reſidue of the purchaſe money, after deducting what the bankrupt had received: And for this reſidue they have brought the preſent action. The objection made is, that the declaration does not ſtate them to be aſſignees.

On conſideration there ſeems to be this diſtinction: If the aſſignees bring an action on a contract made by the bankrupt, *before* his bankruptcy, they muſt ſtate themſelves in the declaration to be aſſignees. But here the contract was after the bankruptcy, when the bankrupt could have no property of his own. The lighter was the property of the aſſignees; and conſequently, the ſale by him, a contract as their agent by operation of law, and on their account. Therefore it was not neceſſary that they ſhould ſtate themſelves to be aſſignees in the declaration; though in reſpect of the evidence in ſupport of the action, it might be incumbent on them to prove the trading, bankruptcy and ſo forth; in ſhort, the whole of their caſe.

WILLES Juſtice.—I am of the ſame opinion. The ſale by the bankrupt in this caſe can be conſidered in no other light than as agent or ſervant to the aſſignees.

ASHHURST Juſtice.—In the caſe of an action at the ſuit of an executor, it is clear, if the action be brought on a contract made by himſelf reſpecting the goods of the teſtator, he need not name himſelf executor. Therefore, I ſhould doubt whether in this caſe it would be neceſſary for the plaintiffs to go into evidence of the trading, bankruptcy, &c. For here there was an actual treaty between the plaintiffs and the defendant relative to the matter in litigation; and not merely a promiſe by implication

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of law. If ſo, the action is founded on an actual contract between the plaintiffs and the defendant: Conſequently the plaintiffs are entitled to recover *ſuo jure*.

Lord *Mansfield* and Mr. Juſtice *Willes* both added that they were very clear on the laſt ground mentioned by Mr. Juſtice *Aſhhurſt*.

Per Cur. Rule for a new trial diſcharged.

Feb. 6th.

PIERSON *verſus* DUNLOP *et al'*.

If the *indorſee* of a bill of exchange, who has received a *navy bill aſſigned* to the *drawee*, as a ſecurity to him (the indorſee) till the bill of exchange is accepted, depoſit ſuch navy bill with the drawee, and the drawee receive the money upon it; he is anſwerable for the amount in an action for money had and received to the uſe of the indorſee, tho' he may have done nothing that amounts to an acceptance of the bill of Exchange.—If the drawee of a bill of exchange ſays he cannot accept it *till ſtores* are paid for; it is an undertaking to accept *when* the ſtores are paid for.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, the facts as they appeared by the report were as follow:

This was an action brought by the plaintiff againſt the defendants, as *acceptors* of a bill of exchange, drawn by *Robert Mac Lintot* upon them, for the ſum of 300 *l.* payable 15 days after ſight to the order of *William Nichol* on account of freight, to be placed to account as *per* advice. The plaintiff was owner of a ſhip of which *Nichol* was the captain, and the bill was indorſed by him to the plaintiff. The ſhip was freighted with naval ſtores by *Mac Lintot*, who, being unable to diſcharge the freight, propoſed to draw the above bill upon the defendants, and to give *Nichol* a *certificate* or navy bill, *aſſigned to the defendants*, as a *ſecurity till the bill of exchange was accepted*. *Nichol* after indorſing the bill of exchange ſent it to the plaintiff together with a letter from *Mac Lintot* to the defendants, in which was incloſed the certificate, which *Mac Lintot* deſired them to tender at the Navy-office, and at the ſame time *adviſed* them, he had *drawn* upon them for 300 *l.* as above. On the 2d of *October* 1776, the plaintiff ſent this letter with the certificate incloſed, and alſo the bill of exchange, to the defendants by one *Lightfoot*, who delivered them accordingly, and the *next* day called again for the bill of exchange. The defendants delivered it up, ſaying, "It "would *not be accepted till* the *navy bill was paid*." *Lightfoot* then demanded the navy bill, but they refuſed to return it, ſaying, "they would receive the money themſelves." On this ſame day (the 3d of *October*) the defendants had written to *Mac Lintot*, acknowledging the receipt of his with the certificate incloſed; that they had delivered it to the Navy-office, and when the money was received they would adviſe him of it:—That his *bill would receive due honour*, but that it was drawn too

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ſhort, being made payable before the navy bill. There were *two* proteſts on the bill of exchange: *One* for non-acceptance, the ground of which was that the defendants would not accept *at preſent*, but would give an anſwer the *next day*, (*viz.* 4th of *October*) after poſt; the *other* was for non-payment, the defendants ſaying they had no advice. At the trial the counſel put the caſe of the plaintiff on *two* grounds. 1ſt, That the defendants' letter to *Mac Lintot* was an acceptance. But Lord *Mansfield* ſaid, he rather thought it a letter of credit, and that, to make it an acceptance, it ſhould have been ſent to the *holder* of the bill. The next ground was, that the anſwer of the defendants to *Lightfoot*, ſaying, "They could *not* accept *till* the *navy bill was paid*," was a *conditional acceptance*: that the plaintiff had a *lien* on it, and therefore, as ſoon as they had received the money, they ought to have paid it to him. One of the ſpecial jury (Mr. *Gorman*) ſaid, the letter of the 3d of *October* to *Mac Lintot* ſtuck with him; becauſe, though it is an univerſal rule among merchants that a mere engagement to the drawer of the bill, is no engagement to the holder of it; yet here it was obſervable, that when the defendants wrote the letter of the 3d of *October* to *Mac Lintot* (the drawer), they had the bill, the certificate and the drawer's letter before them; that the navy bill was ſent for the particular purpoſe of paying the bill of exchange, and that at that time they certainly meant ſo to apply it. The jury accordingly found a verdict for the *whole amount* of the bill in queſtion. *N. B.* There were other counts in the declaration for *money had and received* to the plaintiff's uſe, *&c.* One ground of the motion for a new trial was, that the plaintiff had received 180 *l.* in part of payment of the bill of exchange from *Mac Lintot*: This was verified by affidavit; there had alſo been a proceeding in the *Exchequer* and an injunction granted.

Mr. *Dunning* in ſupport of the rule contended, that this action could not be ſupported upon the ground of a ſuppoſed acceptance. That there was no evidence which bordered on the proof of an acceptance, except the letter from the defendants to *Mac Lintot*: But even *that* could be no acceptance ſo as to render them liable to the holder of the bill; being a tranſaction entirely between them and *Mac Lintot* the drawer; and ſubſequent to the indorſement of the bill to the plaintiff. That the verdict was clearly obtained on the ſecond ground made at the trial: *viz.* that the plaintiff had parted with the navy certificate

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ficate on the faith of the bill being paid upon the ſecurity of it. If ſo, it was founded on a miſtake; becauſe the certificate was evidently of a nature that could not empower any body to receive the money but the defendants. Therefore, what the plaintiff parted with, was of no value; and if of no value, could not be a ſufficient ground in law to raiſe an *aſſumpſit* on the part of the defendants.

Mr. *Wallace contra* for the plaintiff inſiſted, 1ſt, That the declaration by the defendants, "that they could not accept the "bill *till* the *money* upon the *navy certificate was paid*," was an undertaking to accept it *then*. That the certificate was as money; and therefore, having *value* in their hands, there could be no doubt that they meant to accept the bill, though they afterwards refuſed to do ſo. *Secondly*, The plaintiff had a clear *lien* upon the certificate: for though he could not have received the money upon it, being made payable to the defendants, yet it was expreſsly given to him as *his ſecurity* till the bill was accepted. If ſo, the money received by the defendants upon it was money received to his uſe. Therefore, on either ground the plaintiff was entitled to recover. As to the plaintiff's having received 180*l.* from the drawer in part of the bill of exchange, that was no impediment to his reſorting to the defendants for the reſidue. If the verdict therefore was for too much, the plaintiff was ready to remit the difference; but that was no ground for a new trial.

Lord MANSFIELD.—The counſel for the plaintiff have put this caſe two ways: 1*ſt*, That the conduct of the defendants was tantamount to an acceptance. 2*dly*, That the plaintiff had a *lien* on the navy certificate, and conſequently a right to the money received upon it by the defendants, as ſo much money received to his uſe. The 1*ſt* queſtion is, Whether, taking all ſubſequent diſcoveries into conſideration, there is ſufficient ground for the court to ſay the matter ought to be re-tried. 2*dly*, What is to be done in reſpect of the ſuppreſſion on the part of the plaintiff, at the trial, of his having received 180*l.* from the drawer of the bill in queſtion? As to the *firſt*, I am more ſtrongly of opinion now than I was at the trial, that, upon the *merits*, the *verdict* is *right*. The grounds are two: And 1*ſt*, I conſider what the defendants did, as an acceptance. It has been truly ſaid as a *general rule*, that the mere anſwer of a merchant to the drawer of a bill, ſaying, "he will duly honour it," is no acceptance; unleſs accompanied with circumſtances which

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may induce a third perſon to take the bill by indorſement: But if there are any ſuch circumſtances, it may amount to an acceptance, though the anſwer be contained in a letter to the drawer. In this caſe, if it were neceſſary to go into the queſtion, there is great reaſon to ſay, that what the defendants did was equivalent to an acceptance. *Nichol* the captain had a *lien* on the naval ſtores for freight. He had likewiſe a certificate given into his poſſeſſion, as a pledge for the money till the bill of exchange was paid. This certificate was not ſent to the defendants by the poſt in the uſual courſe of trade, but was incloſed to the plaintiff as *his ſecurity*. He was not bound therefore to part with it till the bill was accepted. When the plaintiff tenders the bill for acceptance, the defendant tells him "it could not be ac-"cepted *till the ſtores were paid for*." There may be a *conditional*, as well as an *abſolute* acceptance. What then is this declaration by the defendant, but an undertaking that the bill ſhould be accepted, *when* the ſtores *were* paid for? After this, on the third of *October*, he writes to the drawer ſaying "he "would honour the bill, but he ſhould not have drawn it at ſo "ſhort a day, as it would be due before the ſtores were paid for." This is an admiſſion that he looked to the certificate as to the fund out of which the bill was to be paid. He is *then* called upon for payment; at which time he had actually received the money upon the certificate. But he refuſes to pay, and the only reaſon aſſigned is, "*the want of advice*." That is a falſe reaſon: for he had received advice; and had a fund in his hands out of which the bill was to be paid. But whether he had advice or not was immaterial. For here, the plaintiff had a lien on the certificate: And this certificate he depoſits in the hands of the defendant as a pledge for payment of the bill. Therefore, ſuppoſing for argument ſake, that the defendant at the time he received the certificate had done nothing which could amount to an acceptance, yet after he had actually received the money upon the certificate, he was bound to pay it to the plaintiff. Though the certificate was payable to the defendant, he could not have received the money upon it, if the plaintiff had not delivered it to him. Therefore, the plaintiff had from firſt to laſt a *lien* upon it.—The next queſtion is, What the court ought to do in conſequence of the ſuppreſſion on the part of the plaintiff? The actual arreſt of the drawer is no diſcharge of the acceptor: And I do not think the ſubſequent correſpondence, or any of the other circumſtances ſince, vary this caſe.

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caſe. But the verdict is certainly taken for 180 *l.* more than was due. There was no admiſſion of this payment at the trial, which was very wrong; and has been the occaſion of filing a bill in the *Exchequer*. Therefore there ought to be a deduction of the money received, and a proportionable part of the intereſt, together with all the coſts in the *Exchequer* where this diſcovery was made.

ASTON Juſtice.—I am of the ſame opinion. I think this was clearly a *conditional* acceptance.

Per Cur.—Rule for a new trial diſcharged, upon the plaintiff remitting the ſum of 180 *l.* together with the intereſt upon that ſum from the time it was paid, and diſcharging the coſts of the bill and anſwer in the *Exchequer*, and thereupon the defendant's bill in *Scacc.* to be diſmiſſed.

Friday, Feb. 7th.

SAYRE *et al' verſus* MINNS.

If to a plea of *performance generally* to an action on a ſheriff's bond, the plaintiff reply a *particular warrant*, and that the defendant ought to have made due return, *&c.* but neglected, *&c.* he ought to conclude with a verification.

THIS was an action of debt upon bond brought by the plaintiffs, who were the ſheriffs of *Middleſex*, againſt the defendant, a ſurety of *Joſeph Stanhope*, one of their bailiffs. Upon *oyer* prayed of the bond and condition, it appeared the condition was for the performance of covenants in a certain deed of indenture bearing even date with the bond. The defendant pleaded, 1ſt, *Non eſt factum.* 2dly, A ſpecial plea, ſetting forth the indenture in the condition mentioned, and the ſeveral covenants therein agreed to be performed by the defendant, the affirmative of which (material to this queſtion) were as follow: "That the ſaid *Joſeph Stanhope* ſhould duly "and lawfully execute and ſerve all briefs, precepts, *&c.* directed "to the bailiff of the hundred of *Oſſulſton*, or to him the ſaid "*Joſeph Stanhope*, which ſhould be tendered or come to the "hands of the ſaid *Joſeph Stanhope* to be executed or ſerved; "and ſhould make true return in writing, ſubſcribed with his "own hand, of, to, or upon every ſuch brief, *&c.* and ſhould de- "liver the ſame, together with the returns, to the ſheriff, *&c.* "on or before the day of return, *&c.* 2. And ſhould receive "into his cuſtody, the body of every priſoner whom the ſheriff, "*&c.* ſhould upon warrant tender to him, *&c.* 3. And ſhould "when any goods or chattels by him ſeized or taken ſhould be "ſold, if the money ſhould come to the hands of him the ſaid "*Joſeph Stanhope*, pay or cauſe the ſame to be paid to the under- "ſheriff, his deputy or his clerk. And alſo in caſe any debt.

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"damages, ſum or ſums of money whatſoever, ſhould at any "time be recovered, adjudged or decreed againſt the plaintiffs "for the eſcape of any priſoner, &c. or for any other cauſe, "owing to the negligence or default of the ſaid *Joſeph Stanhope*, "he the ſaid *Rowland Minns* ſhould ſatisfy and exonerate the "plaintiffs from every ſuch damage, &c." The *plea*, as to the negative covenants in the indenture, was ſpecial, that the ſaid *Joſeph Stanhope* had *not* done, &c. in the words of each particular covenant. As to the affirmative, that the ſaid *Joſeph Stanhope* had performed them *generally*.—To this plea the plaintiffs *replied* a writ of *fi. fa.* iſſued on a judgment for 400 *l.* recovered againſt one *Charles Pigot* at the ſuit of *Lucy Groves*, widow, returnable in *Michaelmas* Term 1773. That on the 23d of *Auguſt* 1773, the writ was delivered to the then ſheriffs of *Middleſex*, *Richard Oliver* and Sir *Watkin Lewes*. That they made their warrant in writing to *Joſeph Stanhope*, which was duly delivered to him. That on the 28th of *September* 1773, *Oliver* and *Lewes* went out of office, and the plaintiffs came in, and that *Oliver* and *Lewis* did duly *turn over all writs, &c. remaining in their hands unexecuted*. That after the day of the return of the writ of *fi. fa. viz.* on the 10th of *November* 1773, a rule was ſerved on the plaintiffs to return the ſaid writ, of which the ſaid *Joſeph Stanhope* had notice, and ought to have made a true and lawful return thereto; but he wholly neglected to do ſo; by reaſon whereof a writ of attachment iſſued againſt the plaintiffs on the 5th of *February* 1774, and they were obliged to pay the ſaid *Lucy Groves* 200 *l.* &c. of which premiſſes the defendant afterwards had notice, yet had not exonerated the plaintiffs, contrary to the form of the ſaid indenture; and this they prayed *might be inquired of by the country*, &c.—There was a *ſecond* replication ſetting forth another writ of *fi. fa.* iſſued in *Hilary* Term 1774, upon a judgment recovered by one *John Gloag* returnable on *Saturday* next after eight days of the purification; indorſed to levy 83 *l.* beſides ſheriffs' fees, &c. and delivered ſo indorſed on the 2d of *February* to the plaintiffs to be executed; *by virtue of which writ and of a warrant thereupon made* by the plaintiffs, and before the return, &c. divers goods and chattels of, &c. were ſeized and taken in execution by the ſaid *Joſeph Stanhope* as ſuch bailiff, &c. and were ſold for 61 *l.* 5 *s.* which ſaid ſum came to the hands of the ſaid *J. S.*: by reaſon whereof, the ſaid *Joſeph Stanhope ought forthwith to have paid or cauſed to be paid to the under-ſheriff, &c. the ſaid ſum of money*, &c. And the ſaid plaintiffs afterwards, on the 13th of *June* 1774, were

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were obliged to pay the said sum, of which the said *Rowland Minns* had notice; yet neither the said *J. S.* or *R. M.* had exonerated the plaintiffs, and this *they further pray may be inquired of by the country.*— To these replications the defendant *demurred*, and assigned several causes to each. As to the 1st, That it concludes to the *country*, when the same ought to have concluded with a *verification*. 2d, That it doth not appear any *warrant* was granted by the said *Stephen* and *William* upon the *fi. fa.* 3d, That it doth not appear that *Joseph Stanhope ought to have made any return* upon the warrant so granted. 4th, Or that the writ of *fi. fa.* was turned over by the late sheriffs to the plaintiffs.—As to the second replication: 1st, That it concludes to the *country*, &c. 2d, That it doth not appear *at what time* any warrant was made by the plaintiffs upon the writ of *fi. fa.* or *to whom* such warrant was directed. 3d, Nor is it alleged *by whom* the said goods and chattels supposed to be seized by *J. S. were sold*, or *to whom* the *money*, &c. was *paid*.

Mr. *Baldwin* in support of the demurrer, as to the first objection, insisted it was an established rule in pleading, that wherever new matter is introduced, it is necessary to conclude with an *averment*; that the opposite party may have an opportunity of answering such new matter. 2 *Bur.* 772, *Cornwallis* v. *Savery.*—*Weston* versus *Chapman*, 3 *Bur.* 1,725. the pleading in which latter case, he said, was precisely what it ought to have been in the present. "The plea was a plea of performance "generally. The replication set forth a *particular warrant*, al- "leging that the defendant had not made a due return to it, and "concluded with an *averment*. The defendant instead of demur- "ring as he would have done if the conclusion had been faulty, "took issue on the fact." So here, if the replication had concluded with an *averment*, the defendant might have denied the writ, and ought not to be precluded from doing so. As to the 2d, 3d, and 4th objections, he said, it did not appear that this particular warrant was turned over to the plaintiffs, but only, all *unexecuted* writs. Therefore, it might be that the defendant had executed this writ in the time of the late sheriffs and returned it to them. That the practice, where a writ sued out in *Trinity* Term and delivered in the vacation to the then sheriffs remains unexecuted at the expiration of their office, is, for them to turn it over to the new sheriffs, who make out a *fresh warrant* upon it directed to their *own officer*. That here, the covenant was, that *Stanhope* should make due return to all warrants *directed to him* by the *plaintiffs*; but no such warrant appears

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pears to have been directed by *them*: Conſequently he could not be bound to make any return to it: And therefore his ſureties could not be reſponſible. 3 *Co.* 72. *Vin.* vol. 19. p. 453. E. a. *pl.* 3.

He obſerved in like manner upon the 2d and 3d objections to the 2d replication, that as it did not appear that *Stanhope* was the officer to whom the warrant was directed, or that the money was paid to him, the defendant was not anſwerable.

Mr. *Davenport* for the plaintiffs anſwered all the objections to the ſatisfaction of the court, except the firſt.

Lord MANSFIELD.—I take this to be a rule in pleading: That you cannot go to iſſue on a general averment of performance: And the reaſon is this; that the queſtion may be brought to ſome degree of certainty, and notice given of what is to be agitated at the trial. When a particular breach is aſſigned, there is an affirmative offered on one ſide, upon which the other may take iſſue. But here there is a *general averment*; and no iſſue is offered by the replication. Therefore, upon this objection, I am of opinion with the defendant. Upon all the other points I am clearly with the plaintiffs.

Leave to amend.

THE END OF HILARY TERM.

EASTER TERM

17 GEORGE III. *B. R.* 1777.

Saturday, April 19th.

REX *verſus* HARDY.

The court will not quaſh a poor-rate, unleſs it is unequal upon the face of it.

THIS came before the court upon a rule to ſhew cauſe, why an order of ſeſſions, confirming a rate made by the churchwardens and overſeers of the poor of the pariſh of St. *Clement* in the city of *Norwich*, in and by virtue of a private ſtatute the 10 *Ann. c.* 6. intituled "an act for erecting a "workhouſe and for the better employing the poor of the ſaid "city," ſhould not be quaſhed for inequality. The order of ſeſſions, after ſtating that the defendant had appealed from the above rate, ſet forth a clauſe in the ſtatute, by which a power is given to the governors and guardians of the ſaid workhouſe, to raiſe and aſſeſs certain ſums weekly for the maintenance of the poor, on the reſpective inhabitants, and on every parſon and vicar, and on all and every the occupiers of lands, houſes, tenements, tithes impropriate, appropriation of tithes, and on all perſons having and uſing ſtocks and *perſonal eſtates* in the reſpective pariſhes, towns, hamlets, or precincts within the ſaid city, according to their ſeveral and reſpective values and eſtates. It then went on to ſtate, that on hearing the appeal and reading the rate, it appeared, that the ſaid *James Hardy* the appellant was rated or aſſeſſed towards the relief of the ſaid poor within the ſaid city, in the ſum of 19 *l.* for his farm and lands within the ſaid pariſh of St. *Clement*; and that ſuch aſſeſſment of 19 *l.* was then by all parties admitted to be one full *moiety* or half part of his rack rent, or of the real yearly value of the ſaid farm. And it was alſo admitted by all parties, that every occupier of lands and houſes within the ſaid pariſh were in *like manner equally* aſſeſſed by the ſaid rate for their reſpective occupations, in

in the same proportion as the said *James Hardy*, or as near thereto as may be. And it also appeared, and was by all parties admitted, that the mode adopted and used in and by the same rate, for the assessing all persons within the said parish of St. *Clement* having and using *stock* and *personal estate*, or having money out at interest, was to rate and assess all such persons respectively, in the said parish, at and after the rate of one *twentieth part* of such stock and personal estate, or money out at interest, and to value the interest of such twentieth part at and after the rate of four *per cent. per ann.* and then to rate and assess one moiety of such twentieth part equally in that proportion or as near thereunto as may be. And it further appeared, that ever since the passing and commencement of the said act of parliament, lands, houses, tenements, stocks and personal estates, or money out at interest, of the respective inhabitants within the said parish of St. *Clement* have been constantly there assessed and rated to the poor rates of and for the same parish; and which rates have varied on the several assessments, according to the alterations of the circumstances of the inhabitants of the said parish. And it was thereupon moved by the counsel of the said *James Hardy* the appellant, that the rate aforesaid should be quashed for inequality. But this court upon due consideration of the whole of the premises, doth order that the rate aforesaid be, and the same is hereby ratified and confirmed.

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Mr. *Wallace* and Mr. *Bearcroft* shewed cause.

Mr. *Dunning* and Mr. *Kenyon*, *contra*, in support of the rule for quashing the order of sessions, objected, that the rule of taxation laid down with respect to the assessment of real and personal property in this parish, was manifestly unequal. That real property being rated in the proportion of one full *moiety* of its yearly value, and personalty at only one *moiety* of a *twentieth part*, the burthen sustained by the land-holder was infinitely greater than that imposed upon the stock-holder; therefore the rate was unequal.

Lord MANSFIELD.—Unless we see that *upon the face of the rate*, it is *unequal*, we cannot interfere. Here the Justices have thought it equal, and I do not see any thing in the case that shews the party complaining is prejudiced.

ASTON, Justice.—If the rate does not appear to us to be unequal, we cannot quash it, and so it was held in *Rex* versus *Bregrave*. 4 *Bur.* 2,491.

1777. Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

REX *verſus* HARDY. *Per Cur.* Rule diſcharged.

Same day.

REX *verſus* Inhabitants of CARDINGTON.

The grantee of the right of navigation of the river *Ouze* between *Erith* and *Bedford*, is rateable to the poor of the pariſh of *Cardington* in reſpect of the *tolls* ariſing from a *ſluice* erected *there*; tho' he himſelf *reſides elſewhere*, and the tolls are *collected* in *another* pariſh.

THIS caſe came before the court upon a rule to ſhew cauſe, why an order of ſeſſions, quaſhing a rate or aſſeſſment made for the relief of the poor of the pariſh of *Cardington*, ſhould not be quaſhed as to the aſſeſſment upon *Aſhley Palmer* Eſq. The ſpecial caſe ſtated by the order of ſeſſions was as follows: That *Aſhley Palmer* Eſq; by virtue of letters patent, an act of parliament, and other legal conveyances, is ſeiſed in fee, of the right of navigation of that part of the river *Ouze*, which lies between *Erith* in the county of *Huntingdon* and the town of *Bedford*; and of all the *tolls*, ſums of money and advantages ariſing and becoming payable for the carriage of coals and all other commodities whatſoever, upon that part of the navigation. That this part of the river was made navigable, for the public benefit, by the undertakers and proprietors, from whom Mr. *Palmer* claims, at a great expence; and is ſtill attended with conſiderable charges. That by virtue of the ſaid letters patent and act of parliament, the proprietors are impowered to take and *receive* certain *tolls* for the carriage of coals and other goods, and to *erect* certain *ſluices* and ſtaunches, for the better keeping up the water and carrying on the ſaid navigation; and that the ſaid *tolls* are paid for paſſing through every ſluice and in a different rate, for different ſluices. The ſeveral ſluices have been long ſince erected on the ſaid navigation; and in particular one ſluice acroſs the ſaid river *in* the *pariſh of Cardington* in the county of *Bedford*, at which the toll is three pence *per* chaldron or load weight. That Mr. *Palmer*, does not *reſide in* the pariſh of *Cardington*; nor has he any perſon reſident at that ſluice, to *receive the tolls*: But that the tolls for that ſluice are received at *Barford* or *Eaton*; and the boatmen draw the wicket to paſs. That neither Mr. *Palmer*, nor any of the former proprietors of this navigation, were aſſeſſed to the poor rates, for the ſluices, or for the tolls or profits; though it has been navigable, and the tolls received, for upwards of an hundred years: But they have been for many years aſſeſſed to *Cardington land-tax*, and paid the following annual ſums; 5 *l.* 13 *s.* 6 *d.*

when the land tax was four ſhillings in the pound, and 3 *l.* 13 *s.* 4 *d.* when three ſhillings in the pound; as appears from the aſſeſſment. That the pariſh of *Cardington* have lately aſſeſſed Mr. *Palmer* to the *poor's rates*, for the ſaid ſluices, in the ſum of ſeven ſhillings and ſeven pence halfpenny, being a rate at three pence in the pound. 1777

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This caſe was argued on *Tueſday* the 11th of *February* in laſt term, by Mr. *Bearcroft*, Mr. *Dunning*, and Mr. *Pemberton* againſt the rule, and by Mr. *Wallace* and Mr. *Whitchurch* in ſupport of it *. Againſt the rule it was argued, That this ſpecies of property, *viz.* "tolls and other yearly profits," though expreſsly within the words of the land-tax acts, are clearly not within thoſe of the ſtat. 43 *Eliz. c.* 2: Nor was it the intention of the legiſlature that they ſhould be aſſeſſed to the relief of the poor. If it had been, the legiſlature would certainly have uſed the ſame words in both caſes: Therefore the diſtinction manifeſtly ſhewed they meant to aſſeſs them to the one and not to the other. Beſides, the value was ſo uncertain, that a fair rate could not be made. 2*dly*, Suppoſing it doubtful whether this ſpecies of property was meant to be included under the ſtat. 43 *El. c.* 2. the uſage and practice ought to govern; and here the uſage, from the time the navigation was firſt made, has been uniformly againſt their being rated. But further, Mr. *Palmer* does not reſide, nor is the toll even *received within* the pariſh, but at *Barford* or *Eaton*. Conſequently, if aſſeſſable at all, it muſt be aſſeſſed where received, and not to the pariſh of *Cardington*; and to this purpoſe was cited *Rex* verſus *Rebow*, *Mich.* 12 *Geo.* 3. *B. R.* † as directly in point. If any diſtinction could be made between the two caſes, it was, that the preſent was rather ſtronger than that; becauſe there, two perſons were conſtantly reſident in the light-houſe; the tolls of which were the object of the rate. But here, neither Mr. *Palmer*, nor any body who could repreſent him reſided in this pariſh.

† *Bott's Appendix*, 384.

In ſupport of the rule it was contended that this ſpecies of property, though not expreſsly within the *words*, was clearly within the *meaning* of the ſtat. 43 *Eliz. c.* 2. That there could be no difference between theſe tolls and thoſe of any other deſcription; as the tolls of a market or the like; which were clearly aſſeſſable to the poor; and were ſo held in 3 *Keb.* 540. —As to the value being uncertain ſo is the value of tithes, coal-mines, *&c.* And even in lead-mines, though the adventurers

* Mr. Juſtice *Aſton* was abſent upon the argument.

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are not rateable on account of the riſque they run, the lord is for his ſhare *. In the caſe of *Rex* verſus *Rebow*, inquiry was directed to be made as to the tolls of bridges; when it appeared that *Fulham-bridge* tolls are taxed at the rate of 500 *l. per annum.* Why not aſſeſs theſe tolls as well as them? As to the objection of their not being *received within the pariſh*, they might be received there if Mr. *Palmer* choſe? they are not *neceſſarily* payable elſewhere. But the material thing is, that they *ariſe within the pariſh*: The conſideration for which they are paid, is the *paſſing* through the *ſluice within the pariſh*; and if a boat went no farther, the toll would be equally payable. It is therefore *completely due within the pariſh.* The ground of deciſion in *Rebow*'s caſe was, that the veſſels did *not* come within the pariſh: Therefore the tolls were *not due* there. But here they *do* ariſe, and *are due* within the pariſh.—The court upon this argument ordered the caſe to ſtand over to the preſent term, that inquiry might be made as to the *cuſtom* of rating this deſcription of property in other places.

Mr. *Dunning* now ſtated, that in anſwer to the inquiries made it appeared, that out of *fourteen* ſluices, being the whole number erected upon this navigation, *one* only was rated to the poor. That the river *Ivil*, near *Bury*, the *Northampton* river, *Lark*, *Ouze*, and *Stower* were none of them taxed.—Mr. *Whitchurch contra*, ſtated that the tolls at *Marlow*, *Oxford*, *Reading*, and ſeveral others on the river *Thames* were all rated to the poor.

The court upon the whole thought theſe tolls were rateable; and therefore directed the rule for quaſhing the order of ſeſſions to be made abſolute, and affirmed the rate.

* *Rowls* v. *Gells*, *Eaſter*, 16 *Geo.* 3. *B. R. ſupra*, 451.

Tueſday, *April* 22d.

Mr. Juſtice *Aſton*, abſent.

KENT *verſus* BIRD.

An agreement to pay 20*l.* to the defendant at the next port a ſhip ſhould reach, provided that if

UPON ſhewing cauſe why a new trial ſhould not be granted, Lord *Mansfield* reported the caſe as follows:—This was an action brought by the plaintiff, who was a ſurgeon on board an *Eaſt Indiaman*, againſt the defendant, a paſſenger in the ſame ſhip, to recover a ſum of 1000 *l.* upon a ſpecial agreement bearing date the 18th of *July* 1774; by which, after reciting that "whereas the plaintiff had agreed to pay to

ſhe did not ſave her paſſage to *China*, the defendant would pay to the plaintiff 1000*l.* at the end of one month after ſhe arrived in the river *Thames*, without *reference* to *any property*, though one of the parties had *ſome goods* on board, liable to ſuffer by the loſs of the ſeaſon, is a wagering policy, within the ſtat. 19 *Geo.* 2. *c.* 37.

"the

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" the defendant the ſum of 20 *l.* ſterling at the next port the " ſhip ſhould arrive at, it was witneſſed that he the defend- " ant, in conſideration thereof, did undertake that the ſaid ſhip " ſhould ſave her paſſage to *China* that ſeaſon; and in caſe ſhe " did not, then that he would pay to the plaintiff, the ſum " of 1,000 *l.* at the end of one month after the arrival of the " ſaid ſhip in the river *Thames.*" At the trial it appeared that the plaintiff duly paid the amount of the 20 *l* to the defendant at the next port, in *pagodas*: That the veſſel being delayed below the *Cape* and *Madras*, in conſequence of a miſcalculation of five days in the reckoning, and the monſoons ſetting in earlier than uſual, ſhe loſt her paſſage. That the plaintiff had *ſome goods* on board which were liable to ſuffer by the loſs of the ſeaſon: And that whilſt it was ſtill doubtful whether the ſhip would or would not ſave her paſſage, the captain had applied to each of the parties, to perſuade them to reſcind the agreement; repreſenting that the ſum to be paid in either event, would be more than the loſer could afford. That the plaintiff was willing to have cancelled the agreement, but the defendant poſitively refuſed. The jury found a verdict for the plaintiff, damages 980 *l*: But I gave the defendant leave to move for a new trial upon the queſtion, whether this were not an agreement within the ſtat. 19 *Geo.* 2. *c.* 37. and therefore void.

Serjeant *Hill* and Mr. *Wallace* in ſupport of the rule for a new trial argued, that the inſtrument in queſtion was clearly in the nature of a gaming or wagering policy. That the words of the act are general, " that *all* aſſurances, intereſt or no intereſt, or " by way of *gaming* or *wagering*, ſhall be void;" and being intended to ſuppreſs fraud, ſhould be conſtrued liberally. That this was clearly a ſpecies of inſurance, being made in terms againſt one of the riſks which a common policy inſures againſt; *viz.* that the ſhip would arrive within ſuch a time in *China*. If ſo, it was undoubtedly within the intention of the act, being made without reference to any property on board, though the plaintiff had ſome little intereſt in the cargo.

Mr. *Mansfield* and Mr. *Buller contra* contended, that this was not a caſe within the words or miſchief of the ſtatute. That it was no inſurance againſt the perils of the ſea or loſs of the ſhip or cargo, nor againſt any of the common riſks in common policies; but merely an undertaking on the part of the defendant, that if the ſhip did not ſave her paſſage to *China*,

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he would pay 1,000 *l.* upon her arrival in the river *Thames*. So far from being an inſurance on the loſs of the ſhip, if ſhe had been loſt, the defendant would have ſaved his money. For he was not to pay, except ſhe loſt her paſſage to *China*, and afterwards arrived ſafe in the river *Thames*. That if it reſembled any thing, it was more in the nature of a *bottomree* contract. But to conſtrue it an inſurance, would be to make every wager againſt time a policy of inſurance. Therefore they prayed the rule might be diſcharged.

Lord MANSFIELD.—A policy of inſurance is, in the nature of it, a contract of indemnity, and of great benefit to trade. But the uſe of it was perverted by its being turned into a wager. To remedy this evil, the ſtat. 19 *Geo.* 2. *c.* 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perverſion of this ſpecies of contract, and, amongſt others, that of gaming or wagering under pretence of inſuring veſſels, &c; proceeds, under general words, to prohibit *all* contracts of aſſurance by way of *gaming* or *wagering*. Here the plaintiff gives ſo much to the defendant in conſideration that the ſhip ſhould ſave her paſſage to *China*; and if not, then, upon her returning ſafe to *England*, he is to receive 1,000*l.* If the firſt of theſe events happened, the defendant won; but he could not loſe unleſs both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering policies would be turned into this form, and the act would be entirely defeated. If there is no intereſt in the caſe, it is gaming and wagering. Therefore the rule muſt be made abſolute.

Lord *Mansfield* added, that it would be better for both parties to take it as a verdict for the defendant at the trial, without coſts: And the judgment was entered up accordingly; and the premium returned.

Thurſday, April 24th.

MINORS *et al. verſus* HOUGHTON.

THIS was an action for a boat belonging to the plaintiffs, which was loaded with coals, and was navigated on the *Birmingham* canal; and was there ſeized and ſold by the defendant, who was collector of the tolls and duties payable by boats navigating thereon. The cauſe was tried at the laſt aſſizes held for the county of *Warwick*, when a verdict was found for the plaintiffs, with 13*l.* 14*s.* 6*d.* damages, and 40*s.* coſts. ſubject to the opinion of the court on the following caſe.

In

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In ſtat. 8 *Geo.* 3. *c.* 38. for making and maintaining a navigable cut or canal from *Birmingham* to *Bilſtone*, *&c.* is a clauſe for the more eaſy collecting the rates and duties by the ſaid act directed to paid; "That the maſters, owners and managers of every "boat, keel, and other veſſel navigating, *&c.* ſhall *give a juſt* "*account in writing*, ſigned, *&c.* to the collectors, *&c.* of *what* "*quantities of goods* ſhall be in or belonging to each boat, *&c.* "from whence brought, and where they intend to land the "ſame: And if the goods contained in ſuch boat ſhall be liable "to the payment of different tolls, then ſuch maſter, owner, "or perſon ſhall ſpecify the quantities liable to the payment of "each toll: And in caſe they *neglect or refuſe to give ſuch ac-* "*count*, *or* ſhall give a *falſe account*; *or* ſhall *deliver any part* of "their loading or goods *at any other place* or places than what "is or are mentioned in that account, they ſhall forfeit and pay "to the ſaid company of proprietors, their ſucceſſors and aſſigns, "the ſum of *ten ſhillings* for *every ton of goods which ſhall be in* "*ſuch boats* or veſſels reſpectively, of which account ſhall be ſo "refuſed to be given, or of which *ſuch falſe account ſhall be given*, "or which ſhall be delivered out as aforeſaid, as the caſe ſhall "happen to be; over and above the reſpective rates and duties "they are obliged to pay for the ſame. And in caſe of neglect, "refuſal, or denial of payment on demand of ſuch forfeiture or "forfeitures beforementioned, or any part thereof, to the ſaid "company of proprietors, their ſucceſſors and aſſigns; that then "and in ſuch caſes the ſame ſhall be recovered and levied in "ſuch manner and by ſuch methods as the ſaid tolls, rates and "duties are therein before directed and appointed to be recover-"ed and levied."

The plaintiffs were owners of the boat in queſtion; which, at the time it was taken, was loaded with coals, and was navigated on the canal. The defendant is collector of the duties. The coals, by the rate of tonnage ſettled under the authority of the act, were liable to a tonnage of 1*s.* 3 *d. per* ton; and were worth to be ſold 2 *s. per* ton, excluſive of tonnage. The plaintiffs (or the perſons having the command of this boat under them) delivered to the defendant as collector as aforeſaid, an account, in writing, of the quantity of coals contained in the boat; in which account it is ſtated to be only *twenty-two* ton and *ten* hundred weight. On the ſame being weighed it appeared that the real weight thereof was *twenty-four* ton and *eight* hundred weight; whereupon the defendant ſeized the boat. On the boat being

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ſeized, the plaintiffs immediately tendered to the defendant the money admitted to be due for the tonnage of the whole quantity of coals, and alſo 20 *s.* as the penalty forfeited for reporting the weight of the coals to be *two* ton leſs than the real weight thereof; and demanded the boat: But the defendant refuſed to accept the money tendered, or to deliver the boat, inſiſting that the plaintiffs had forfeited *ten ſhillings a ton on the* WHOLE *quantity of coals* contained *in the boat*; and gave notice in writing to the plaintiffs, "that unleſs they paid ten ſhillings a ton for every ton of "coals contained in the boat, within five days he would ſell "the boat, to levy that penalty." Upon the plaintiffs not complying with that demand, the defendant, after the end of five days, ſold the boat, and, out of the money ariſing by the ſale thereof, retained the amount of the freight for the coals, and ten ſhillings a ton for every ton of coals contained in the boat, and alſo the coſts and charges of the ſeizure, diſtreſs and ſale; and returned the overplus to the plaintiffs.—The queſtion reſerved for the opinion of the court was, Whether, upon the true conſtruction of the above ſtated clauſe of the act, the plaintiffs had forfeited and were liable to pay the penalty of ten ſhillings a ton *only* upon the *difference* between the weight or quantity *given in*, and the *actual* weight and quantity contained in the boat; or upon the whole weight or quantity contained in the boat?

Mr. *Dayrell* for the plaintiffs argued, that upon the true conſtruction of the ſtatute, the ſingle forfeiture of ten ſhillings *per* ton, could only be multiplied by the number of tons over and above the quantity given in, and not by the groſs number of tons contained in the veſſel. That this was apparent from the manner in which the penal part was worded; For inſtead of ſaying that "In caſe they ſhall neglect or refuſe, *&c.* or ſhall give "*a falſe account*, or ſhall deliver, *&c.* that then, *in all* and in "*either* of thoſe caſes, they ſhall forfeit and pay ten ſhillings "for *every ton of goods which ſhall be in ſuch boat*," and ſtopping there; the act goes on and ſays, "of which account ſhall be "refuſed, or of which ſuch falſe account, *&c.*" which latter words plainly ſhew the forfeiture is only to accrue upon the quantity not given in, *&c.*: otherwiſe the repetition would have been fruitleſs. Beſides, a different conſtruction would make the forfeiture beyond meaſure ſevere and oppreſſive, and out of all proportion to the fraud intended to be ſuppreſſed.

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Mr. *Wheeler contra* contended, that upon the plain ſenſe and meaning of the ſtatute, the party offending in this caſe, was liable to the penalty of ten ſhillings *per ton* upon the *whole quantity* of goods contained in the boat. That here the forfeiture was incurred for not giving in a full account; therefore if falſe as to any part, it muſt be falſe in *toto*. That the words were expreſs; "Shall forfeit and pay ten ſhillings for *every* ton of goods, "which *ſhall be* in ſuch *boat*, of *which ſuch falſe account* ſhall "be given;" *not* "of which *no* account ſhall be given;" for that might have made it clearer the other way: but as it now ſtands, it is plain the forfeiture was to be according to the whole number of tons contained in the veſſel. But if there were any doubt, it was cleared up by the ſpecific weight to which the ſingle penalty was confined, *viz.* 10*s.* for every ton; for if the penalty could only be levied upon the quantity not given in, there might always be 19 *cwt.* over the quantity given in, and no penalty at all incurred.

Cur. adviſare vult.

Afterwards, on *Monday*, *May* 12th, in this term, Lord *Mansfield* delivered the reſolution of the court * as follows:

We are all of opinion, that the penalty in this caſe ſhould not be ten ſhillings *per* ton upon the groſs weight or quantity of goods contained in the boat; but ten ſhillings *per* ton only upon the *difference* between the weight or quantity given in, and the actual weight or quantity contained in the boat. The conſequence is that there muſt be

Judgment for the *Plaintiffs*.

* *Aſhhurſt*, Juſtice abſent.

WARNER *et al. verſus* THEOBALD.

Tueſday, April 29th.

Rient in arrere is a good plea to an action of *debt* for *rent*.

IN debt for rent, the plaintiff declared upon an indenture of leaſe for 21 years, made between *William Watts* (who at the time of the indenture was poſſeſſed of the premiſes for the reſidue of a term of 61 years commencing in the year 1759) on the one part; and *James Gubbins* of the other part: The declaration ſtated the demiſe, the entry of *Gubbins*, &c. and that afterwards *Watts* ſold the reverſion to the plaintiffs. That ſubſequent to ſuch ſale of the reverſion, *all* the eſtate, &c. of *Gubbins* came by aſſignment to the defendant, who entered, &c. after which *half a year*'s rent, *viz.* 20 *l.* became due and in arrear. The defendant pleaded that "nothing of the rent *is* in ar"rear and unpaid as by the declaration is above ſuppoſed." The

plaintiffs

1777. plaintiffs demurred, and aſſigned for ſpecial cauſe: 1ſt, That it was not alleged that the rent was paid on the 24th of *June* 1776, or *when it became due*, or *when* the ſame was paid. 2d, That it did not allege, that the rent was paid *before* or *at the time of exhibiting the bill*, or that the ſame *was not then in arrear and unpaid*.

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Mr. *Buller* for the plaintiff ſtated the queſtion to be, Whether in debt for rent by an aſſignee againſt an aſſignee, the plea of *riens in arrere* was a good plea; and he inſiſted it was not. Becauſe upon ſuch a plea, it is impoſſible for the plaintiff to tell what it is the defendant means to inſiſt on at the trial; whether he will deny the original leaſe, or any intermediate aſſignment; or whether he means to ſet up a payment *before* or *ſince* the action brought. For it only ſays "nothing *is* in arrear," which muſt relate to the time of the plea pleaded. But it might be in arrear *before*, and at the time of the action brought. Therefore, upon ſuch a plea, *non conſtat when*, or how payment was made; or whether levied by diſtreſs, or releaſed. Conſequently the plaintiff is at a total loſs what defence to prepare to meet. The only inſtance of a plea of this kind is in 1 *Brownlow* 19. *Hare* v. *Savile*; and there the court held it bad. It is true, that was an action of *covenant* for rent, but there is no difference in this caſe between *covenant* and *debt*.

Mr. *Wood contra* for the defendant ſaid, the whole diſtinction was between *debt* and *covenant*. That in the *latter*, *riens in arrere* was clearly a bad plea, for the reaſon aſſigned in *Hare* v. *Savile*; "becauſe it confeſſes the covenant to be broken, and "tends but in mitigation of damages." But *debt*, is to recover the ſpecific ſum due; and if that is paid, there can be no damages for the detention. It is eſſential that it ſhould be due at the time of the action brought; and that is the only point for the defendant to anſwer. The form of the plea is, *nil debet*, in the *preſent* tenſe; which has reference to the time of the action brought. In covenant it is, *non infregit conventionem*, in the *paſt*. In *detinue*, the principle is the ſame: The plea is *non detinet*: The only difference is, that the one is to recover goods and chattels, the other money. But in this caſe *riens in arrere* is a fairer plea than *nil debet*: Becauſe *nil debet* puts the whole declaration in iſſue; whereas, *this* confines the queſtion to the ſingle fact, "whether ſuch rent was due." Yet *nil debet* would have been a good plea. *Hardr.* 332. 2 *Ld. Raym.* 1,503. *Bul. Ni. Pr. 2d. edit.* 170. Indeed, between *nil debet* and *riens in arrere*, there is no ſubſtantial difference. In *replevin*, the latter is the conſtant

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conſtant plea. So in debt and in annuity, which is in the nature of an action of debt.—As to the ſecond objection, that the plea does not ſay the rent *was* in arrear at the time of the action brought, the anſwer is, that the plea relates to the time of bringing the action; therefore, whether alleged in the paſt or preſent tenſe, makes no difference: Becauſe payment ſubſequent to the action brought could not be given in evidence. But if this were an objection, the ſubſequent words, "as by the declaration is "ſuppoſed," would cure it effectually. If not, it would apply to every plea of *non eſt factum*, *nil debet*, *non detinet*, *riens per diſcent*, &c. to every action in the *Common Pleas*, and to verdicts; all which run in the preſent tenſe. But various precedents of ſimilar pleas are to be found in *Raſtall* 175, 176. *Winch. Ent.* 10. *Placita generalia.* 106. and moreover, it is the conſtant practice.

Mr. *Buller* in reply. The plea of *riens in arrere* is not a general iſſue; therefore the caſes cited are not applicable. The words "as the declaration ſuppoſes" are in this caſe mere words of form; and do not go to the time when the rent became due. There is in ſubſtance no difference between this caſe and *Hare* v. *Savile*: Here, the allegation is, that the rent was due on the 24th of *June* 1776. That allegation is not anſwered by a plea which only ſays, "nothing *is* now in arrear:" Becauſe that might be perfectly true, though it were confeſſed at the ſame time that the rent was due when the action was commenced. Therefore the plaintiff is entitled to judgment.

Lord MANSFIELD.—Mr. *Wood* has fully ſatisfied me. Nothing can be clearer than the preſent caſe. The declaration ſays, there is ſo much rent in arrear. The plea ſays, there is not. The ſaying there is nothing in arrear, is the ſame as if he had ſaid *nil debet*; and it is abſurd to ſuppoſe that it relates to the time of the plea, and not to the action. Beſides it is a more favourable plea for the plaintiff; it is an anſwer to the action. The action is in the preſent tenſe: So is the plea. It is the general iſſue. If the rent *was* due, and *is* not at the time of the plea, it could not have ceaſed to be due, but by the plaintiff's accepting it: And if ſo, he waves the action, though it was well brought at the time.

Per Cur. Withdraw the demurrer on payment of coſts.

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Thurſday, May 1ſt.

General declarations, or the anſwer of a *parent* in *Chancery*, are good evidence, after the death of ſuch parent, *to prove that a child was born before marriage*; but *not*, to prove that a *child born in wedlock* is a *baſtard*.

GOODRIGHT *ex dim.* STEVENS *verſus* MOSS *et al.*

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Mr. Juſtice *Willes* reported from Mr. Baron *Eyre* as follows:

This was an ejectment for two meſſuages, *&c.* demiſed by *Samuel Stevens* on the 1ſt of *March* 1776, for ſeven years. Plea, not guilty. Verdict for the plaintiff.

The leſſor of the plaintiff claimed to be entitled to the premiſſes for which the ejectment was brought, as couſin and heir at law of *Ann Stevens*, who died ſeiſed. And the only queſtion in the cauſe was, whether the leſſor of the plaintiff was the *legitimate* ſon of *Francis* and *Mary Stevens*; or *was born of* Mary *before their marriage*.—For the plaintiff, the *regiſter* of the *marriage* of *Francis Stevens* and *Mary Packer*, dated *November* 2d, 1703, and the *regiſter* of the *birth* of the leſſor of the plaintiff, in the following words, "Chriſtenings 1704, *Samuel* ſon of "*Francis* and *Mary Stevens baptized July* 3d," were produced. It was inſiſted, on the part of the defendant, "that the leſſor "of the plaintiff was *born and privately baptized before the mar-* "*riage*, and that there was a *public baptiſm after the mar-* "*riage*," which accounted for the regiſter.—They firſt offered witneſſes to *general declarations* by the *father* and *mother*, that *Samuel* the leſſor of the plaintiff *was born before marriage*, which evidence Mr. Baron *Eyre* was of opinion to *reject*.—They alſo offered evidence, that there was a *general reputation* in the place, where the father and mother and *Samuel* reſided, "that he was "born *before* marriage;" which Mr. Baron *Eyre* was likewiſe of opinion to reject.—They further offered to produce one *Joſeph Dowſell* as a witneſs, to prove that he had *heard one Crips ſay* many times "that the leſſor of the plaintiff was a baſeborn child," which evidence was rejected: And laſtly, they offered an anſwer of the *mother* of the leſſor of the plaintiff to a *bill in the court of Chancery* by the committee of *Ann* a lunatic, the perſon laſt ſeiſed, againſt the leſſor of the plaintiff and his mother; in which anſwer, the *mother declared him* to be *illegitimate*; that he was *born before marriage* and privately baptized; and again publicly baptized after the marriage: Which evidence Mr. Baron *Eyre* was alſo of opinion to *reject*. Whereupon a verdict paſſed for the plaintiff, ſubject to the opinion of the court upon theſe points of *evidence*.

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GOOD-RIGHT *verſus* MOSS.

Mr. *Howarth* and Mr. *Jones* now ſhewed cauſe, and inſiſted, that though the teſtimony of parents in their life-time, or their declarations after their deceaſe, might be admiſſible in caſes where proof of the marriage was *preſumptive* only, as by *cohabitation*, or *general reputation*; yet neither their declarations, nor their perſonal teſtimony could be admitted to baſtardize their iſſue; where, as in this caſe, the fact of the marriage was actually proved. If ſo, the evidence offered was rightly rejected. In ſupport of this poſition they cited the following authorities. *Rex* v. *Inhabitants of Reading*, *Mich.* 8 *Geo.* 2. *B. R. Caſes temp. Lord Hardwicke* 79. *Rex* verſus *Rook*, *Mich.* 26 *Geo.* 2. *B. R.* 1 *Wilſ.* 340. *Rex* v. *Inhabitants of St. Peter's Worceſter*. *Bur. Set. Caſ.* 25. *Rex* v. *Inhabitants of Stockland*, *Bur. Set. Caſ.* 506. 8 *Mod.* 180. *Code*, *Lib.* 2. *tit.* 4. *lex.* 26. *Lib.* 8. *tit.* 47. *lex.* 6. 9. 10. *Dig. lib.* 5. *tit.* 2. 27. *Lib.* 22. *tit.* 3. 29.

Lord MANSFIELD.—All the caſes cited, are caſes relative to children *born in wedlock*: And the law of *England* is clear, that the declarations of a father or mother, cannot be admitted to baſtardize the iſſue born after marriage. But here the evidence offered is only to prove the time *when the iſſue was born*; and to ſhew, whether it was *before* the marriage or *after*. The objection that is made to it goes a great way indeed; for it goes to this; that even if the father and mother were alive, their own teſtimony could not have been received.

Mr. *Wallace* and Mr. *Bower contra*, in ſupport of the rule, admitted the fact of the marriage, but nevertheleſs contended the evidence offered ought to have been received. That the legitimacy of the leſſor of the plaintiff did not depend, upon whether *F. Stevens* or a third perſon was his father, ſuppoſing him to be actually born in wedlock; but upon the fact, whether he *was* born in wedlock or *not*. That the regiſter, though evidence of his being the ſon of *M.* and *F.* was by no means *concluſive* as to the *time* of the *birth*. What then is the beſt evidence the nature of the thing will admit of? Moſt clearly the teſtimony of the parents themſelves, if alive; eſpecially, of the mother. If ſo, why are not her declarations to be received after her death. (Lord *Manſfield*. Suppoſe the father had entered the day or hour of the child's birth in a leaf of his Bible, would not that have been evidence? Moſt undoubtedly it would.) And though there are many diſtinctions in the books, as to how far an anſwer, or depoſitions in one ſuit, may, or may not, be read in another ſuit not between the ſame parties; the mother's anſwer in

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Chancery is here offered only as a ſolemn declaration by her in her life-time. In queſtions of pedigree, declarations of perſons of the family have been frequently admitted. Parents have been examined in court: And in *Rex* v. *Inhabitants of Reading**, the mother was admitted to prove every thing but the want of acceſs, though the child was born in wedlock. (Lord *Mansfield*. It was formerly held, that if the huſband was within the four ſeas at the time the child was born, no evidence could be admitted to prove it was illegitimate; but that doctrine was overruled in the caſe of *Pendrel* v. *Pendrel*†; and from that time the law has been ſettled the other way‡.)

* Caſ. temp. Lord *Hardwicke*, 79.

† 2 *Str.* 925.

‡ 3 *P. Wms.* 276.

Lord MANSFIELD.—The *whole* of this evidence has been rejected. If *any part* of it ought to have been received that is *material*, there ought to be a new trial; and there can be no doubt of its being material.

This caſe has been argued at the bar with a greater latitude than I thought it could have been. *Two* queſtions have been made: 1ſt, Whether the *father* and *mother* could have been examined, if *alive*. 2dly, If they could, whether their declarations, though ever ſo ſolemn, can be admitted as evidence *after their death*. In this caſe there is evidence of the fact of the marriage. But there is no evidence of the time of the *birth*. The regiſter only proves the Chriſtening; but *non conſtat* from thence, when the child was born. As to the firſt queſtion, I ſhould as ſoon have expected to hear it diſputed, whether the atteſting witneſſes to a bond could be admitted to prove the bond. I have known it done over and over again: And it is much too clear to admit of a doubt. In this court, at *niſi prius*, a mother was allowed to prove a clandeſtine marriage at the *Fleet*, and no other evidence was given, to ſhew the legitimacy of the child. A great eſtate was recovered upon her ſingle teſtimony, and no objection whatever ſtarted as to the admiſſibility of it. In Lord *Valentia*'s caſe, in the Houſe of Lords§, where the queſtion was, Whether the Earl of *Angleſea* was married to the Counteſs *Dowager* of *Angleſea* on the 15th of *September* 1741, prior to the birth of Lord *Valentia* their ſon, who was born in the year 1744, the Counteſs *Dowager*, having no intereſt, was admitted as a witneſs to prove the fact of the marriage. In *Stapylton* v. *Stapylton*‖, upon an iſſue to try whether the plaintiff was legitimate or not, the mother attended at *Guildhall* to prove he was illegitimate. But it happened that ſhe had made an affidavit, in which ſhe had ſworn that ſhe and her huſband

§ Adjudged *April* 22d, 1771.

‖ About the year 1739. *Vide* 1 *Atk.* 4.

husband had been married long before the plaintiff was born; and this affidavit was intended to be used against her. Upon this fact being known, it was thought prudent not to call her: But there was not an idea on either side, that she was not a proper witness to the fact of the marriage.—As to the *time of the birth*, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality, and policy, that they shall not be permitted to say *after marriage*, that they have had *no connection*, and therefore that the offspring is spurious; more especially the mother, who is the offending party. That point was solemnly determined at the delegates. But the question of access or non-access is totally different from giving evidence of the time of the birth.—The next question is, Whether the declarations of the father and mother in their life-time, can be admitted in evidence after their death? Tradition is sufficient in point of pedigree: Circumstances may be proved: For instance: Suppose from the hour of one child's birth to the death of its parent, it had always been treated as illegitimate, and another introduced and considered as the heir of the family; that would be good evidence. An entry in a father's family bible, an inscription on a tombstone, a pedigree hung up in the family mansion (as the Duke of *Buckingham*'s was), are all good evidence. So the declarations of parents in their life-time. I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard *eigne* and the subsequent marriage, to prevent controversy in the family touching the inheritance. If the *credit* of such declarations is impeached, it must be left to the jury to judge of. As to the declaration made by the mother of the present plaintiff, in her answer to the bill filed against her in the Court of *Chancery*, it is not like offering a deposition or an answer in evidence against a person not a party to the original suit. That cannot be done for this reason; because such person has it not in his power to cross examine. But here the answer is offered only as evidence under her hand, of her having made such declaration. Therefore I am of opinion, that as *part* of the evidence, which was *material* in this case, and which ought to have been admitted, was rejected; there must be a new trial.

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ASTON Justice.—I am of the same opinion. I think rejecting the general declarations of the father and mother was wrong: And here the declarations are not inconsistent with the register, but

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GOODRIGHT *verſus* MOSS.

WILLES, Juſtice.—I am of the ſame opinion.

Per Cur. Rule for a new trial abſolute.

Same day. DENN *ex dim.* TARZWELL *verſus* BARNARD.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Mr. Juſtice *Willes* reported from Mr. Baron *Hotham* as follows:—This was an ejectment tried at the laſt aſſizes at *Taunton*, in the county of *Somerſet*, for certain premiſes in the pariſh of *Street*, which *Mary Tarzwell*, before her marriage with *Richard Skitter*, demiſed to the plaintiff: She claiming under an aſſignment from *William Tarzwell* the younger, who took under *the will of his father William Tarzwell* the elder. *Thomas Tottle* ſaid, he knew *William Tarzwell* the ſon. That he had an houſe, orchard, and garden, at *Street*, which belonged to his mother before, who has been dead ten or eleven years. That *William* was in poſſeſſion about *two* years ago: But how much longer he could not ſay. But one *Atwell*, who lived there above *ten* years ago, paid rent, *before* that time, to *William* for one end of the tenement: And *William* kept poſſeſſion of the *orchard* ever ſince his mother's death. The *deed of aſſignment* from *William Tarzwell* and *Mary Tarzwell* dated the 26th of *February* 1771, was then read; by which, *William Tarzwell*, in conſideration of *love and affection*, and for divers ſervices done and performed by the ſaid *Mary* for the ſaid *William*, and alſo of the ſum of *ten ſhillings*, aſſigned the premiſes to *Mary Tarzwell*, her executors, adminiſtrators and aſſigns, for and during all the reſt, reſidue, and remainder of a certain term of 2,000 years, formerly raiſed and granted thereon, then ſubſiſting, and undetermined, for the yearly rent of *one ſhilling*. There was a covenant "that he had full power to aſſign," and "for quiet enjoyment "during all the reſt and reſidue of the ſaid term therein yet to "come and unexpired." The ſubſcribing witneſs to this deed ſaid, that *William Tarzwell* lived at *Bladrop* in the pariſh of *Street*, at the time of the execution of the deed: That *Mary* was *not preſent:* But he was perfectly ſober at the time. He brought the deed with him to her, and ſome ſhillings paſſed from her to him. It was not called a deed of gift; but a deed of aſſignment. He offered to give up the writings to her; but

ſhe

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ſhe ſaid he might keep the premiſes for his life; though ſhe had a right to them immediately. It was by her conſent he continued in poſſeſſion. He gave directions about the eſtate ever ſince his mother's death; which was in 1765 or 1766. A year ago, *William* offered her ten pounds for the eſtate, which ſhe refuſed; ſaying, at the ſame time, "that it was not her intention to turn him out."

William Southey, the officer of the ſurrogate's court, produced the will of *William Tarzwell*, the father, dated the 25th of *Auguſt* 1755, by which he gave the premiſes to his wife; and after her deceaſe, to his ſon *William* during the term he had therein unexpired. On the will was indorſed the act of court, dated the 1ſt of *June* 1756, in theſe words: "This was proved, "*&c.* on the oath of *Elizabeth Tarzwell*, ſole executrix therein "named, who was then ſworn, *&c.*"—The defendant refuſed to enter into any title, whereupon a verdict was taken for the plaintiff, with liberty to move for a new trial, without coſts, on theſe two grounds. 1ſt, That the deed of aſſignment, without the production of the original term of 2,000 years, ought not to have been left to the jury. 2d, That the *probate* of the will of *William Tarzwell*, though made 21 years ago, and though eleven years have elapſed ſince the death of the executrix, ſhould have been produced, notwithſtanding the act of court entered upon the will itſelf.

Mr. *Manſfield* againſt the rule, as to the 1ſt objection ſaid, that conſidering the length of poſſeſſion under the will, and no title whatever attempted to be ſhewn on the part of the defendant, there was ſufficient ground, without producing the original deed, creating the term of 2,000 years, for the jury to find a fee. As to the latter objection, an authentic certificate from the Prerogative Court, and produced by the proper officer, was equivalent to the probate itſelf; being in fact the ſame thing, only under another form.

Mr. *Gould contra*, contended that the recital of one deed in another, is no evidence of the deed recited, though the deed containing the recital be well proved; becauſe the atteſtation of the original deed is ſtill wanting. *Roe* v. *Huntington*, *Vaughan* 74. 82. 10 *Co.* 92. If the recital therefore was inſufficient, the poſſeſſion had nothing to apply to; and clearly in point of time it would not make a fee: for the teſtator died in 1756; and the aſſignment was in 1771.

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Lord MANSFIELD.—The ſingle queſtion in this caſe is, Whether, upon all the evidence given, the plaintiff ought to be nonſuited, not having ſufficiently made out his title? The defendant has not attempted to ſhew any title. The argument on the part of the defendant has proceeded upon a ſuppoſition of a preciſe title ſet up. But I confeſs I do not ſee it in that light. The title is a poſſeſſion of 20 years. The argument ſuppoſes the teſtator had juſt got poſſeſſion at the time of making his will. But that is not warranted by the facts. It is proved that in 1755 he made his will, and gave the premiſes in the manner ſtated in the report. How long he was in poſſeſſion before, does not appear. But the defendant does not attempt to ſhew any one elſe was in poſſeſſion before. It reſts therefore in preſumption; and conſequently was matter proper for the conſideration of the jury. The poſſeſſion afterwards was clearly *under the will*, till within two years before the title tried. What elſe appears to ſhew that the title was not a fee? It is anſwered, that the teſtator held under an old term of 2,000 years. But that will not avoid the title, if the jury are ſatisfied that he has been in poſſeſſion 20 years. If no other title appears, a clear poſſeſſion of 20 years is evidence of a fee; not that he held under the leaſe. The leaſe is one of his muniments. No man has a leaſe of 2,000 years *as a leaſe*; but as a term to attend the inheritance. Half the titles in the kingdom are ſo. Therefore unanſwered, I think this was very good evidence to leave to the jury.

Per Cur. Rule diſcharged.

Friday, May 2d.

GOODTITLE *ex dim.* ROBERT EDWARDS *verſus* PETER BAILEY.

In *ejectment*, which is a *fictitious* action to recover the poſſeſſion, the leſſor of the plaintiff ſhall not be permitted to *defeat a ſolemn deed under his own hand*, covenanting that the *defendant* ſhall *enjoy* the premiſes, and alſo, for *further aſſurance*.

UPON ſhewing cauſe why the nonſuit entered in this caſe ſhould not be ſet aſide, and a new trial granted, the facts appeared to be as follow:

It was an ejectment brought for two tenements in the county of *Dorſet*, diſtinguiſhed by the names of the greater and leſs tenement. The plaintiff claimed under the will of one *Nicholas Edwards*, dated *March* 12th 1750, by which he deviſed the premiſes in queſtion "to his wife *F. Edwards*, for life, and "after her deceaſe to his brother *John Edwards*, to be at his "diſpoſal: But in caſe he ſhould happen to die before the "ſaid *F. Edwards*, then he gave the premiſes to his couſin "*Robert*

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" *Robert Edwards*, (the plaintiff,) and his heirs and aſſigns for " ever:" And he died ſoon after. Upon his death, *John Edwards* entered into and kept poſſeſſion of the *greater* tenement during his life; and by will deviſed *both* the tenements to the defendant *Peter Bailey*. He was poſſeſſed of ſeveral other premiſes which he deviſed to the leſſor of the plaintiff, by the ſame will: And died in the life-time of *Frances*, the widow, who, upon the death of *Nicholas* her huſband, entered into and kept poſſeſſion of the *leſs* tenement till ſhe died.—Upon the death of *John*, *Peter Bailey*, the defendant, took poſſeſſion of the greater tenement, which *John* during his life had occupied. Soon after, *Robert*, the leſſor of the plaintiff, by deed of releaſe, bearing date 5th *January* 1764, reciting the will of *Nicholas*, and alſo reciting the will of *John Edwards*, the brother of *Nicholas*; and further that *Frances* the widow had ſurvived *John*, whereby the reverſion of the premiſes was become veſted in him *Robert* in fee; reciting alſo that it had been agreed that he the ſaid *Robert* ſhould renounce all his right, title, and intereſt in the ſaid premiſes, to *Peter Bailey*, *the ſaid* Nicholas Edwards *having no power to deviſe the ſame*; he did thereby *renounce*, *remiſe*, *releaſe*, *and for ever quit claim* to the ſaid *Peter Bailey*, and the heirs male of his body, all the ſaid premiſes, and all his right, title, and intereſt therein; with a covenant for further aſſurance. Subſequent to this releaſe, the widow died; and then *Robert*, the leſſor of the plaintiff, brought this ejectment. Upon the releaſe being read and proved, ſeveral objections were taken to it at the trial on the part of the plaintiff. 1. That there was no *privity* of eſtate between the leſſor of the plaintiff and the defendant, at the time of the releaſe. To this it was anſwered, that it was not a releaſe by way of enlargement of the eſtate, but *pur mitter le droit*, therefore no privity was neceſſary: But this objection was given up. 2. That in reſpect of the leſſer tenement, the widow being in poſſeſſion, there was no eſtate in *Peter Bailey* at the time, upon which the releaſe could operate. 3. That it was fraudulent upon the face of it, being without conſideration; and alſo, for that the recital, relative to *Nicholas* having no power to deviſe the premiſes, was falſe; to prove which, the plaintiff in reply produced the will of *John*, the father of *Nicholas*, giving the premiſes to *Nicholas* in fee.—But theſe objections were overruled by the judge, who thought that as the leſſor of the plaintiff took a conſiderable eſtate under the will of *John Edwards*,

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under which the defendant claimed, he ought not to be allowed to impeach it; and accordingly directed a nonſuit.

Mr. *Mansfield* and Mr. *Buller* now argued in ſupport of the nonſuit, and againſt the rule for a new trial. Mr. Serjeant *Heath contra*, for the rule.

For the defendant it was argued, that ſuppoſing the *releaſe* could not operate as *ſuch*, for want of a ſufficient poſſeſſion in the releaſee at the time, yet it might operate as a *grant* of the *reverſion*. It is a ſettled rule in the conſtruction of deeds, that if ſufficient appears to ſhew the intention of the party to convey, though it cannot take effect in the preciſe form in which it was intended, it ſhall operate in the way in which it can, rather than the intent of the parties ſhall be fruſtrated. *Sheppard*, in his *Touchſtone* 82, ſays, "A deed made to one purpoſe, may enure to "another; if meant for a releaſe, it may amount to a grant of "the reverſion; or *e converſo*." So in 2 *Wilſ.* 75. a deed, intended for a releaſe, was held to operate as a *covenant to ſtand ſeiſed*: And the caſes there cited eſtabliſh the doctrine. If ſo, nothing can be clearer than the intention of *Robert* to convey in this caſe; not only from the general words of the deed, but from the covenant for further aſſurance. But a deciſive anſwer is, that the plaintiff is eſtopped by his own deed. The claim he ſets up is expreſsly againſt his own deed, and the objections made to the form of it, go to defeat it. No man ſhall be ſuffered to do that. As to the objection of *fraud*, becauſe the recital relative to *Nicholas*, is falſe, the circumſtances manifeſtly ſhew there was ſome inſtrument, though none ſuch has appeared, under which *John Edwards*, was entitled, which warranted him in taking poſſeſſion of the greater tenement, as he did, in the life-time of the widow, and diſpoſing of them both at his death, notwithſtanding the will of *Nicholas*. With reſpect to there being *no conſideration*, the eſtate which the plaintiff took under the will of *John Edwards*, was a ſufficient conſideration for his confirming the deviſe of the premiſes to the defendant. But if it were not, as the plaintiff is content to take ſuch eſtate, he ought not to diſturb the other deviſees in the will. Therefore upon every ground the nonſuit was right.

Lord *Mansfield* as to the objection of fraud obſerved, there was no evidence of any fraud; that the recital did not appear to be the inductive cauſe of the releaſe; and unleſs ſome inducement was ſhewn, fraud could not be preſumed. If any colourable evidence of fraud had been given, the nonſuit would have been wrong;

wrong; becauſe fraud in this caſe would be a matter of fact; of which the jury are to judge. So if the plaintiff could have made out a caſe of *miſtake*, it would have been equivalent to fraud. But nothing of the kind appears; and as to the conſideration, it might be fair enough. It depends upon the treaty.

For the plaintiff, as to the *other* point, it was contended, that admitting the rule laid down to be true in its fulleſt extent, yet nothing paſſed by the releaſe in this caſe for want of proper operative words. There are appropriated terms to every conveyance: And where the word "*grant*" is uſed, being *genus generaliſſimum*, if the inſtrument cannot take effect according to its proper form, it ſhall operate in ſome other if by law it can. But here the words are "*renounce, remiſe, releaſe* and *quit claim*," which are the ſpecial form of words adapted to a *releaſe* only; therefore it cannot operate as a grant. And ſo is *Co. Lit.* 301. "A re-"leaſe cannot operate as a grant, becauſe it is a peculiar man-"ner of conveyance adapted to a ſpecial end." In the caſe from 2 *Wilſ.* 75. the word "*grant*" was uſed; and ſo it was in the caſes there cited. But here there is no ſuch word, nor any thing equivalent to it; conſequently nothing paſſed by the deed. If not, the defendant's caſe is not aided by the covenant for further aſſurance; for that at moſt conveys only an equitable right: And as to its being an eſtoppel, the plaintiff is not eſtopped from ſaying any thing, but that the defendant has *no intereſt*.

Lord MANSFIELD.—The rules laid down in reſpect of the conſtruction of deeds are founded in law, reaſon, and common ſenſe: That they ſhall operate according to the intention of the parties, if by law they may: And if they cannot operate in one form, they ſhall operate in that, which by law will effectuate the intention. But an objection is made in this caſe, which, it is ſaid, takes it out of the general rule and the doctrine of the authorities cited: And that is, that in the releaſe in queſtion the word "*grant*" is not made uſe of. But that the intention of the parties was to paſs all the right and title of the plaintiff in theſe premiſes, is manifeſt beyond a doubt. One thing however is deciſive. This is a *fictitious* action to recover the poſſeſſion. In ſuch an action if a man has made a ſolemn deed covenanting that another ſhall enjoy the premiſes, and likewiſe for further aſſurance, it ſhall never lie in his mouth to diſpute the title of the party to whom he has ſo undertaken; no more than it ſhall

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be permitted to a mortgagor to diſpute the title of his mortgagee. No man ſhall be allowed to diſpute his own ſolemn deed. Therefore *quâcunq. viâ datâ*, the nonſuit was right. It would be very idle to ſet aſide the nonſuit, only to ſend the party into equity and make him pay the coſts that way.

ASTON Juſtice.—This is the common wording of a releaſe; but though in the ſhape of a releaſe, if there are ſufficient words, it may operate as a grant. The laſt ground however is deciſive: It is clear from the general complexion and circumſtances of this caſe, that there had been ſome diſpute between the parties relative to the wills of *Nicholas Edwards*, and his brother *John*; and that this releaſe was an agreement between them for the purpoſe of adjuſting all matters in difference: And there is a covenant for further aſſurance. I think it would be extremely improper after that, to let the party take a legal objection for the purpoſe of defeating his own ſolemn agreement.

Per Cur. Rule diſcharged.

Saturday, May 10th.

BOND *verſus* NUTT.

If a ſhip, inſured *at* and *from* Jamaica, *warranted* to have ſailed on or before a particular day, (with a return of premium in caſe of *convoy*) ſail, on or before the day, from her port of lading, with all her cargo and clearances on board, to the uſual place of rendezvous at another part of the iſland, for the ſake of joining there, it is a performance of the warranty, tho' ſhe be afterwards detained there by an *embargo*, *beyond* the day.—Tho' ſuch place of rendezvous be *out* of the *direct courſe* of the *voyage*, it is no *deviation*.

UPON ſhewing cauſe why a new trial ſhould not be granted, in this caſe, Lord *Mansfield* read his report as follows:

This was an action on a policy of inſurance upon the ſhip *Capel* in the *Weſt India* trade, loſt or not loſt, *at* and *from Jamaica* to *London*; *warranted* to have ſailed *on* or *before* the 1ſt of *Auguſt* 1776. The policy was effected on the 20th of *Auguſt*, 1776, at a premium of 15 guineas *per cent.* to return 5 *per cent.* if the ſhip departed with convoy, and 8 *per cent.* if with convoy for the voyage, and arrived ſafe. At the trial there was no controverſy about the facts; and they are ſhortly theſe: The ſhip was completely laden for her voyage to *England*, at *St. Anne's* in *Jamaica*; and ſailed from *St. Anne's* bay on the 26th of *July* for *Bluefields*, in order to join the convoy there; *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* ſtation, like *Spithead* in *England*; and where a convoy then lay, which was expected to ſail for *England* every day: But the greater part of the way from *St. Anne's* to *Bluefields*, is out of the direct courſe of the voyage from *St. Anne's* to *England*. That ſhe arrived off *Bluefields* on the 28th or 29th of *July*: where ſhe was immediately ſtopped by an embargo laid on all

veſſels

veſſels being in any part of *Jamaica*, and was detained there till the 6th of *Auguſt*, when ſhe ſailed with the convoy for *England*; but afterwards, being ſeparated in the paſſage, was taken by an *American* privateer.—Upon theſe facts the jury found a verdict for the defendant. 1777.

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Mr. *Wallace* and Mr. *Baldwin* ſhewed cauſe; and the caſe was ſpoken to, on two ſeveral days in this term: Firſt, on *Thurſday* the 24th of *April*; and again on *Tueſday*, the 6th of *May*. At the trial, the ſingle queſtion was, Whether the ſhip did, or did not, ſail on or before the 1ſt of *Auguſt*? But on the argument *two* points were made on the part of the defendants. 1. That the departure from *St. Anne*'s, was not a departure from *Jamaica* within the meaning of the policy. 2. If it were, that the going to *Bluefields* was a *deviation*. As to the 1ſt point it was obſerved, that ſhips in the *Jamaica* trade inſure againſt two different riſks, according to the ſeaſon. 1. The riſk here inſured, called the *Summer* riſk, which ends on the 1ſt of *Auguſt*. 2. The *Winter* riſk, which begins on the 2d of *Auguſt*, and is ſo called from the hurricanes uſual about that time. A *ſtrict* departure therefore by the *preciſe* day ſpecified in the policy, is of the very eſſence of the contract. It is a *condition precedent* which muſt be complied with, or the underwriters will not be liable. To determine whether it has been complied with in this caſe, the terms of the policy are material. Now this inſurance is *not*, "*at* " and *from St. Anne's*;" but, "*at* and *from Jamaica*," which is not only the *common*, but *neceſſary* form of policies upon *Jamaica* ſhips: becauſe, as it is the practice for them to ſail from port to port to complete their lading, they are under ſuch a policy protected in coaſting to and fro', till they finally depart from the iſland for *England*. For the ſame reaſon they are never conſidered as having *ſailed* on their voyage, till they have actually cleared the iſland. The queſtion therefore is, was it the intention of the *Capel*, when ſhe left *St. Anne*'s, to ſail *directly* for *England*? Moſt clearly it was not. If it were, *Bluefields* was entirely out of her courſe; and conſequently a deviation. On the other hand, can there be a doubt but if ſhe had been captured in going to *Bluefields*, that the underwriters upon this policy would have been liable? For *Bluefields* is as much a *part* of *Jamaica* as *St. Anne*'s: And equally included under the word "*at*." Either way therefore, the verdict was right. 1. If the voyage begun at *St. Anne*'s, the going to *Bluefields* was a deviation. 2. If it did not begin at *St. Anne*'s, there was no departure from *Jamaica* till after the 1ſt of *Auguſt*. Conſequently the underwriters are not liable.

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Mr. *Dunning* and Mr. *Buller contra*, in ſupport of the rule inſiſted, as to the 1ſt point, that the departure from *St. Anne*'s being a departure from the *port of diſcharge*, with all the cargo, ſhip's papers and clearances on board, was a complete departure from *Jamaica* for the voyage. Suppoſing the practice to be as ſtated, that veſſels in this trade do ſail from port to port to complete their lading, and conſequently are not conſidered as having ſailed till they finally depart for *England*, the inference drawn could not hold in this caſe. Becauſe here, the *Capel*, when ſhe left *St. Anne*'s, had every thing ready: her lading was complete; her crew, captain, cargo, clearances, were all on board; ſhe had no occaſion to go to any other port; and her full intention was finally to depart for the voyage, meaning only to touch at *Bluefields* for *the ſake of the convoy* then ready. If ſo, though *Bluefields* might be a little out of the direct courſe, it was no deviation in law. *Spithead*, the general rendezvous for convoy in *England*, is out of the direct courſe of moſt ſhips bound to foreign parts: yet it never was held a deviation for any ſhip to go there for the purpoſe of joining the convoy. It is a *juſtifiable* reaſon: And there are authorities in which it has been ſo held. Therefore there is no ground for either objection, and the rule ought to be made abſolute.

Lord MANSFIELD.—One point now ſtarted is entirely new: that ſuppoſing the voyage to have begun from *St. Anne*'s, the going to *Bluefields*, (which, it is admitted on all hands, was out of the courſe of the voyage) though for the *purpoſe of convoy only*, ſhall be conſidered as a deviation. In anſwer, it has been ſaid by the counſel for the plaintiff, that there are caſes in which the contrary has been held. But they are not cited. I could wiſh therefore that thoſe authorities might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude.

Adjornatur.

Upon this cauſe coming on again, nothing new was added on the firſt point. The ſecond point was put thus: Whether, if the inſurance had been from *St. Anne*'s to *England*, and the *Capel* had gone to *Bluefields* (out of her direct courſe) for the ſole purpoſe of meeting with convoy, it would have been a deviation; or as much a proſecution of her voyage, as if ſhe had diverted her courſe to avoid an enemy. Mr. *Dunning* and Mr. *Buller* for the plaintiff, contended it would not have been a deviation, and their argument

was

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was as follows: Whenever a ſhip does that which is for the general benefit of all parties concerned, the act is as much within the ſpirit of the policy, and conſequently as much protected by it, as if expreſſed in terms. It cannot be diſputed but the act in this caſe was for the benefit of the inſurers, as well as the inſured. *Bluefields*, where the ſhip went, was the *general place of rendezvous* for convoy; and not a *port*, but an *open road*: No motive of *trade* therefore could, or in fact did carry her thither; her cargo being complete at *St. Anne's*. It is true, as *St. Anne's* lies on the oppoſite ſide of the iſland, and out of the direct courſe from thence to *England*, there was *in fact* a *deviation*: But ſuppoſe ſhe had ſprung a leak and put back to the neareſt port to refit; would that have been a deviation? Certainly not. To determine whether a diverſion from the direct courſe of the voyage, is ſuch a deviation as in law vacates the policy, the motives, end, and conſequences of the act muſt be attended to. A juſtifiable motive will excuſe. In the caſe of *Motteux* verſus *The London Inſurance Company*, 1 *Atk.* 545. "The ſhip *Eyles* was inſured "from *Fort St. George* to *London*. Upon her arrival at *Fort* "*St. George* from *Bengal*, ſhe proved to be ſo leaky, that by "the advice of the governor, &c. ſhe *returned to Bengal* to "refit. But being done from neceſſity, and not for any *purpoſe* "*of trade*, the underwriters were held liable." If a deviation is juſtifiable for the purpoſe of repairs, it is equally ſo for the ſake of convoy; more eſpecially if it be according to the uſage, and the convoy ſtationed at the cuſtomary place. This is expreſsly laid down in two caſes: *Bond* v. *Gonſales*, at *Ni. Pri. coram Holt*, C. J. 2 *Salk.* 445. and in *Gordon* v. *Morley*, *at Ni. Pri. coram Lee*, C. J. 2 *Str.* 1,265. The *intention*, and *not* the *letter* of the contract, is the true rule of conſtruction; 3 *Bur.* 1,237. Therefore, though a difference may be taken between the preſent caſe and thoſe cited, that in *them* there was an expreſs *warranty* to depart with convoy, and *here*, there is *no* ſuch warranty; yet there is in this caſe that which is *tantamount*. For the *return of premium* was to be apportioned accordingly. It was clearly therefore a circumſtance in the contemplation of the parties: And it never could have taken place if the ſhip had not gone to *Bluefields*. Conſequently, what the captain did was not only within the ſpirit and meaning of the contract, but in furtherance and execution of the intention of the parties. If ſo, it can never be conſtrued to vacate the policy. The whole of this doctrine is more fully illuſtrated in the caſe of *Pelly* v. *The Royal Exchange Aſſurance*

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Assurance Company (commonly called the *Bank-fault* case) 1 *Bur.* 341, and *Tierney* v. *Etherington* there cited; and these principles are laid down: 1. "That whatever is usually done, is presumed to be "foreseen and in contemplation of the parties: And therefore "is understood to be referred to by every policy, and to make a "part of it, as much as if it was expressed." 2. "If what is done "by the master, is *ex justâ causâ*, as to refit, or to avoid enemies "or pirates, the policy shall *continue*." 1 *Bur.* 351. If it is *ex justâ causâ* to *avoid* an enemy, it is not less so to obtain that protection which will enable the ship to pursue its course in safety. And here, the act done was most for the benefit of the party complaining; the premium to be returned bearing no proportion to the diminution of the risk occasioned by the ship's sailing with convoy. But it may be urged, that being no immediate danger, there was no *necessity* here, as there is in the cases put. It is true there was no *physical necessity*; but there was *that* which the law holds *equivalent*. It was, in *prudence* and *discretion*, *necessary* and *advisable* to be done, and for the *general benefit* of the owners, insurers and all parties concerned. Therefore they prayed the rule might be made absolute.

Mr. *Wallace* and Mr. *Baldwin contra*, for the defendant. The whole of the argument has proceeded upon assuming *that* as a condition of the policy which makes no part of it; and avoiding that which is the *sole* condition and stipulation between the parties: *viz.* the time specified for the ship's departure. It is true there was to be a return of premium *if* the ship departed with convoy, but there is no agreement or obligation that she should sail with convoy. It is no *part* of the contract, but only a possible event, for which, if it did happen, an allowance was to be made in the price of the premium. The ground of the policy is, that the ship should sail by a particular day. It is the *sole* condition, and the terms of it express and precise. The single question then is, have these terms been complied with? It is insisted they have; for that the ship sailed for the voyage on the 26th of *July*; and though the going to *Bluefields* was out of her course, yet being for the sake of convoy only, it was *ex justâ causâ*: therefore, no deviation. But, 1. How does it appear that this was *ex justâ causâ*? There was no immediate danger, no enemy in sight, no condition in the policy to seek for convoy. 2. How was it beneficial to the underwriter? His intention was to run *all risks*, provided the ship departed on a particular day; and to avoid the risk of the season and weather

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after that time: That was his ſole object. Will then the court take upon them to determine, that it was more his intereſt to run the riſk of the ſea, which *he* meant to avoid, than the riſk of capture, which he was indifferent about? If it will not, there is an end of the queſtion. It is very different from the caſes cited. In *them*, there was an *expreſs warranty* to depart with convoy. No doubt, in ſuch a caſe, all the *means* of attaining the end inſured are neceſſarily included in the policy: And *there*, the *ſeeking* for convoy is *part* of the contract. But here, the *time* of *departure*, is the *ſole* ground. It is an expreſs condition which neither ſtorm nor enemies, unleſs complied with, can excuſe. As to the argument of its being beneficial to all parties, *that* would equally apply if the ſhip had ſtaid in the harbour of *St. Anne*'s in expectation of convoy; or if the convoy had not ſailed from *Blueſields* for a month after the *Capel* arrived. And there is no drawing the line. Therefore the verdict is right, and the rule ought to be diſcharged.

Lord MANSFIELD.—I am extremely glad this motion has been made; the cauſe came on at *Guildhall*, by the candour of the parties, in the faireſt manner. But I had no intimation of its being a cauſe of conſequence till after the verdict; when I was informed 100,000*l.* depended upon it. The queſtion was fairly tried, and the caſe has been very well argued on both ſides. I have thought much of it ſince the trial. Some things are clear: And there are ſome which require conſideration. The policy was made on the 20th of *Auguſt* 1776, upon the contingency of a fact which muſt have exiſted one way or the other at the time the policy was underwritten. That contingency was, that the ſhip ſhould have ſailed on or before the 1ſt of *Auguſt*: Conſequently, it muſt have taken place or not upon the 20th of that month. The port from whence the ſhip was to be inſured was, if I may uſe the expreſſion, the whole iſland of *Jamaica*. But from which of the ports the ſhip would ſail neither party knew. Therefore they have uſed the words "*at* and *from Jamaica*:" By force of which, ſhe certainly was protected in going from port to port, and *till* ſhe ſailed. It follows that the word "ſailed" in the warranty, muſt mean that ſhe had ſailed on her *homeward bound voyage*. The queſtion then is a matter of fact; and one that admits of no latitude, no equity of conſtruction, or excuſe. Had ſhe or had ſhe not ſailed on or before that day? That is the queſtion. No matter what cauſe prevented her; if the fact is, that ſhe had not ſailed, though ſhe ſtaid behind for the

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the beſt reaſons, the policy was void: the contingency had not happened; and the party intereſted had a right to ſay, there was no contract between them. Therefore, what was ſaid by Mr. *Wallace* in the argument, is very true: If ſhe had been prevented by any accident from ſailing till the 2d of *Auguſt*, as by the ſudden want of any neceſſary repair, or if an enemy had been at the mouth of the port; the captain would have done very right not to ſail, but there would have been an end of the policy. It is very different from the caſes where a voyage has been begun: There the *uſage* of the voyage may juſtify going a little out of the direct courſe. This alſo is clear; if the ſhip had broken ground and been fairly under ſail upon her voyage for *England* on the 1ſt of *Auguſt*, though ſhe had gone ever ſo little a way, and had afterwards put back from the ſtreſs of weather, or apprehenſion from an enemy in ſight, or had then been put under an embargo, and been detained till *September*, it would ſtill have been a *beginning* to ſail; and the ſtoppage would have come too late. Becauſe the warranty was upon a fact *antecedent*. Such a caſe * happened before me a day or two after the preſent action was tried. It was an inſurance upon a ſhip from *Grenada* to *London* warranted to ſail on or before the 1ſt of *Auguſt*. She had barely begun to ſail on the day when ſhe was ſtopped by an embargo, and detained beyond the time. I thought the voyage was begun: The jury were of that opinion, and there has been no motion for a new trial.—I am giving no opinion, only breaking the caſe. Here the whole queſtion turns upon this: Did the voyage from *Jamaica* homeward, begin from *St. Anne*'s or from *Bluefields*. Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reaſonable, and for the benefit of all parties: But ſtill it does not vary the fact of ſailing. Here it was very reaſonable: But the queſtion whether the voyage began from *St. Anne*'s or *Bluefields* ſtill remains.—Another material circumſtance ariſes from the words "at and from *Jamaica*." At the trial I reaſoned thus: "By the terms of the policy ſhe was protected during "her ſtay at *Jamaica*: By force of them, ſhe had a right to "go to any port, or all round the iſland; and ſhe went to "*Bluefields* for reaſons beſt known to herſelf. Therefore the "voyage began from *Bluefields*." Had the inſurance been "*at "and from the port of St. Anne's*," it did ſtrike me that going round the iſland to *Bluefields* would have been a deviation. But this

* The name of it was *Thelluſſon* verſus *Ferguſon*.

is a queſtion of ſo much value and conſequence, that the court wiſhes to conſider the caſe thoroughly, before they give a final deciſion upon it. 1777.

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ASTON Juſtice.—I ſhall be very glad to conſider this caſe. As at preſent adviſed, it ſeems to me to depend upon a mere matter of fact: And therefore to be very different from the caſes of deviations that have been put. In them, the change of voyage being from neceſſity is excuſed in point of law: But here, the whole queſtion is, did the *Capel* ſail from *Jamaica* on or before the 1ſt of *Auguſt* according to the true ſenſe and meaning of the policy? If ſhe had fairly commenced her voyage on her departure from *St. Anne*'s, and the going to *Bluefields* is to be taken as the *uſage of the voyage*, I ſhould think the underwriters would be liable. So, if ſhe had broken ground for the voyage, and had gone but a league and been blown back again. But, if ſhe found no convoy at *Bluefields*, ſhe could not have ſtaid there to wait for convoy: That would have vacated the policy. So, if her going to *Bluefields* is to be conſidered only as a continuation of her ſtay at *Jamaica*, the policy is at an end. She certainly was ready at *St. Anne*'s to depart for the voyage: And ſhe went to *Bluefields*, not to take in part of her cargo (for then it clearly would not have been a commencement of the voyage), but from a juſt motive. Whether that was or was not a commencement of the voyage, is clearly a matter of fact; and, in this caſe, a very material one; therefore ought to be very fully conſidered.

WILLES Juſtice.—This is clearly a matter of fact. I think if the ſhip upon her arrival at *Bluefields* had found no convoy, ſhe could not have ſtaid there; but muſt have ſailed immediately; or if ſhe had met with convoy and had ſtaid an unreaſonable time for other ſhips, the inſurers would not have been liable.

Cur. adviſare vult.

Afterwards on this day Lord *Mansfield* delivered the opinion of the court as follows: We are all ſatisfied that the truth of the caſe is, that the voyage from *Jamaica* to *England* began from *St. Anne*'s. That, when the ſhip ſailed from *St. Anne*'s ſhe had no view or object whatſoever, but to make the beſt of her way to *England*; and ſhe touched at *Bluefields* only, as being the ſafeſt and beſt courſe (under the then circumſtances) of her navigation to *England*. That the value of this queſtion admitted on both ſides ſhews, that every other ſhip under the ſame circum-

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cumſtances looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the ſafeſt courſe of navigation from *Jamaica* to *England*; and that it would have been unwiſe and imprudent for any ſhip not to have touched there. The *great diſtinction* is this: That ſhe ſailed from *St. Anne's* for *England by the way of Bluefields*; and that it was not a voyage from *St. Anne's* to *Bluefields* with any object or view diſtinct from the voyage to *England*. If ſhe had gone firſt to *Bluefields* for any purpoſe independent of her voyage to *England*, to have taken in water, or letters, or to have waited in hopes of convoy coming there, none being ready, *that* would have given it the condition of *one* voyage from *St. Anne's* to *Bluefields*, and *another* from *Bluefields* to *England*. But here, under all the circumſtances, we think ſhe had no other object than to come to *England* directly by the ſafeſt courſe. Therefore the rule for a new trial muſt be made abſolute.

THE END OF EASTER TERM.

TRINITY TERM

17 GEORGE III. *B. R.* 1777.

REX *verſus* CLARK *et al.*

Saturday, May 31ſt.

THIS was an information filed by the Attorney General againſt the three defendants *Clark*, *Lilly*, and *Bateman*, upon the ſtat. 8 *Geo.* 1. *c.* 18. *ſect.* 25. for *aſſaulting* and *reſiſting* certain cuſtom-houſe officers in the execution of their duty, and *reſcuing* out of their cuſtody ſixty half anchors of brandy and ſixty half anchors of geneva, which they had ſeized: By reaſon whereof, and by force of the ſaid ſtatute, the information ſtated, "that "the ſaid defendants had *ſeverally* forfeited the ſum of 40 *l.* "a-piece." There was a ſecond count for the *aſſault only*, without the reſcue, which concluded in the ſame manner, "that "the defendants had ſeverally forfeited the ſum of 40 *l.*"

At the trial before Lord *Mansfield*, at the ſittings after *Hilary* term 1777* at *Weſtminſter*, upon "not guilty" pleaded, the jury found the defendants *ſeverally* guilty.

Mr. *Buller* laſt term† obtained a rule to ſhew cauſe why the judgment ſhould not be arreſted, upon this objection, "that the "verdict againſt the defendants was for *three* ſeveral ſums of "40 *l.* each; whereas by the act of parliament the offence was "*entire*, and only *one* penalty of 40 *l.* given for one and the "*ſame* offence." And inſtanced the caſes of convictions upon the game-acts, where, though ſeveral offenders are concerned, only *one* penalty can be recovered againſt them all. *Hardman qui tam* v. *Whitaker*. *Mich.* 1748. 22 *Geo.* 2. *B. R.* MSS. So *one* penalty only for killing ſeveral hares on the ſame day. *Marriot* v. *Shaw*. MSS‡.

Upon an information and verdict againſt *ſeveral* perſons, for obſtructing a Cuſtom-houſe Officer contrary to ſtat. 8 *Geo* 1. *c.* 18. *ſ.* 25. *each* defendant is *ſeparately* liable to the penalty impoſed by the act. —Where an offence created, or made penal, by ſtatute, is in its nature ſingle, one ſingle penalty only can be recovered, tho' *ſeveral* join in committing it.—But if the offence is in its *nature*, *ſeveral*, *each* offender is *ſeparately* liable to the penalty.

* 13th *Feb.* † 17th *April.* ‡ A caſe of this name is reported in *Comyns*, 274.

Mr.

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Mr. *Wallace* now ſhewed cauſe, and objected, 1. That the motion was *premature*: becauſe if either of the defendants were liable, the Attorney General might ſign judgment againſt him only, and releaſe the reſt. The defendants therefore ſhould have waited till judgment had been entered up againſt all; and then have availed themſelves of the objection upon error, if warranted in point of law. But 2dly, ſuppoſing the application regular at this time, there is no ground for the objection. For the penalty is not in the nature of a ſatisfaction to the party grieved, but a puniſhment on the offender; and *crimes* are *ſeveral*. So it is expreſsly laid down in *Regina* verſus *King et al.* 1 *Salk.* 182. This was an offence at common law, for which each party might have been indicted and *ſeverally* puniſhed by fine and impriſonment; and the ſtatute was made to *add* an *accumulative* puniſhment: whereas, if the conſtruction contended for by the defendants were to prevail, the greater the number of offenders, the leſs would be the puniſhment.

Mr. *Buller contra*, in ſupport of the rule. 1. As to the application being premature, if the error aroſe upon the verdict alone, it might be ſo, becauſe the Attorney General might cure it by a *noli proſequi*. But the ground of the objection is, that the *information* itſelf is inſufficient upon the *face* of it, for it is there laid as a *ſeveral* offence. Therefore, the parties at their election may take advantage of it, either in arreſt of judgment, or by writ of error. 2. With reſpect to the principal queſtion, whether ſeveral penalties can be recovered where ſeveral perſons are concerned in one and the ſame offence, it is clear by the words of the ſtatute that only *one* penalty can be recovered. For it is not ſaid "that *every* perſon offending ſhall for *every* ſuch offence "forfeit, *&c.*;" but, "if any perſon or perſons ſhall, *&c.* the "*party* or *parties* ſhall for *every* ſuch offence, forfeit and loſe "40 *l.*". The word "*perſons*" and "*parties*" manifeſtly ſhew the legiſlature meant to provide againſt a *joint* offence by *ſeveral* perſons; but not to multiply the penalty on that account: The penalty refers to the *offence*, *not* to the *perſons*; and ſo it is laid down in *Cro. Eliz.* 480. *Partridge* v. *Nailor*: reported likewiſe in *Moore* 453. and *Noy.* 62. That was an action on the ſtat. 1 & 2 *Phil. & Mar. c.* 12. brought againſt three defendants for impounding diſtreſſes in ſeveral places. Upon not guilty, the jury found a verdict againſt all three; and judgment was entered up for 5 *l.* and coſts againſt each defendant ſeverally. But upon error it was held to be clearly bad, there being but *one* offence; notwithſtanding the words of the ſtatute there are, that

that "*every perſon* offending ſhall for *every ſuch offence* for- 1777.
"feit, &c."

So in convictions upon the ſtat. 5 *Ann. c.* 14. though ſeveral are concerned in the ſame offence, one penalty only can be recovered. *Hardman qui tam* v. *Whitaker et al. Mich.* 22 *Geo.* 2. *B. R.* 1748. MSS.—Therefore he prayed the rule might be made abſolute. Rex verſus CLARE.

Lord MANSFIELD.—There is no cauſe of greater ambiguity, than arguing from caſes without diſtinguiſhing accurately the grounds upon which they were determined. The true reaſon of the caſes which have been cited in ſupport of the motion, and the diſtinction between thoſe caſes and the preſent, is this: Where the *Offence* is in its *nature ſingle*, and cannot be ſevered, there the *penalty* ſhall be only *ſingle*; becauſe, though ſeveral perſons may join in committing it, it ſtill conſtitutes but *one* offence. But where the offence is in its nature *ſeveral*, and where *every* perſon concerned may be *ſeparately* guilty of it, there, each offender is ſeparately liable to the penalty; becauſe the crime of each is diſtinct from the offence of the others, and each is puniſhable for his own crime. For inſtance; the offence created by the ſtat. 1 & 2 *Phil. & Mar. c.* 12. is "the impound-"ing a diſtreſs in a wrong place." One, two, three or four, may impound it wrongfully; it ſtill is but *one* act of impounding, it cannot be ſevered It is but *one* offence; and therefore ſhall be ſatisfied by *one* forfeiture. So, under the ſtat. 5 *Ann. c.* 14. for the preſervation of the game; killing a hare is but *one* offence in its nature; whether one, or twenty kill it, it cannot be killed more than once. If partridges are netted by night; two, three, or more may draw the net; but ſtill it conſtitutes but *one* offence. But *this ſtatute* relates to an *offence* in its *nature ſeveral*; a ſeveral offence at common law: and the ſtatute adds a further ſanction againſt that, which each man muſt commit ſeverally. One may reſiſt, another moleſt, another run away with the goods: One may break the officer's arm, another put out his eye. All theſe are diſtinct acts; and every one's offence entire and complete in its nature. Therefore each perſon is liable to a penalty for his own ſeparate offence—With reſpect to the application being premature, Mr. *Buller* has ſufficiently anſwered that objection. The information itſelf lays it as a ſeveral offence; therefore a motion in arreſt of judgment is proper.

ASTON Juſtice.—Suppoſe a perſon, not preſent at the time of the offence being committed, were to have adviſed or procured it to be done: I am of opinion, under the words of this act, he would

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be liable to the penalty. The diſtinction is, that the offence here, is in its nature *ſeveral*. I remember the caſe of *Hardman qui tam* verſus *Whitaker et al.* There, the offence was conſidered as being in its nature only *one* offence. But in this caſe, the offences of the ſeveral defendants are diſtinct and ſeparate.

Per Cur. Rule diſcharged.

Saturday, June 8th.

REX *verſus* FRANCIS HILL.

Where it has been the *uſage* in a pariſh to rate perſons to the poor for their *ſtock in trade within the pariſh*, ſuch perſons are liable under the ſtat. 43 *El. c.* 2. to be rated to the poor in reſpect thereof.

MR. *Manſfield*, Mr. *Morris*, and Mr. *Batt* ſhewed cauſe againſt a rule for quaſhing an order of ſeſſions confirming a poor's rate. The order of ſeſſions was as follows: *Wilts*— Upon hearing the appeal of *Francis Hill* againſt a rate for the relief of the poor of the pariſh of *Bradford*, in this county, complaining that he was aſſeſſed and rated, for, and in reſpect of, his ſtock in trade in the ſaid pariſh, whereas he was adviſed that he was not by law liable to be ſo aſſeſſed and rated, in reſpect of ſuch ſtock in trade; It appeared in evidence, that the ſaid appellant was a clothier, and that he was, and for ſome years paſt had been, an *inhabitant* in the ſaid pariſh of *Bradford*, where many other tradeſmen, particularly clothiers and manufacturers of woollen goods, likewiſe lived: And that he there carried on the buſineſs of a clothier; and, at the time of making the rate in queſtion, was actually poſſeſſed of a conſiderable ſtock in ſuch his trade, within the ſaid pariſh of *Bradford*. And that the churchwardens and overſeers of the poor of the ſaid pariſh, at *Eaſter* 1775, made the rate in queſtion; which was properly allowed by two juſtices of the peace, for the relief of the poor of the ſaid pariſh: and therein charged the appellant a *penny* as his ſhare or contribution towards the relief of the poor of the ſaid pariſh for the ſaid year 1775, in *reſpect of* his *ſtock* in the ſaid clothing *trade*, which he then had in the ſaid pariſh; and which ſaid charge of a penny a rate, was proved to be more than his juſt proportion or ſhare towards the ſaid rate, *if, in reſpect of* ſuch his ſaid *ſtock in trade*, he was legally bound to contribute any thing towards the relief of the ſaid poor of the ſaid pariſh. Whereupon, and upon due conſideration of the premiſes, this court doth order and adjudge, that the ſaid rate be, and the ſame is, hereby confirmed.

Mr. *Batt* argued as follows: This queſtion takes a different turn from any other that has been diſcuſſed here: For it is ſtated

not

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not as a case of landholders aggrieved by the omission of a set of men, rateable, as they conceive, in respect of their *personal* property; but as a complaint by a tradesman upon his being rated to the poor for his *visible stock in trade*, within the parish: And this is the shape in which, Lord *Mansfield* said in the *Witney* case, such a question ought to come on: Not, as a *general* question, whether stock in trade be rateable or not; but, as the particular one made by an individual, whether he is bound to contribute to the poor's rates in respect of the stock in trade which he possesses within the parish of *Bradford*. The whole question, therefore, depends upon the construction of the stat. 43 *Eliz. c.* 2. And the best way to attain the true construction of that act, is to examine the law antecedent to the making of it.

By the *common law*, as appears by the *Mirror*, *p.* 14. "the poor "were to be maintained by the parsons, rectors of the church, "and by the parishioners;" but by what mode is not there specified. There is however a recognition of this provision, in the case of *Rex* v. *Loxdale*, *Hil.* 30 *Geo.* 2. *B. R.* * It is a matter of obscurity how the poor were maintained before the statutes which now provide a maintenance for them. The religious houses most probably contributed much towards it: And this conjecture seems the better founded, from the time when the first provision was made for them by statute; which was in the 27th year of *Hen.* 8th, just about the time of the dissolution of the monasteries. I shall select the most remarkable expressions in that, and the several subsequent statutes, in order the better to ascertain the true intent and meaning of them. By the 27th *Hen.* 8. *c.* 25. "the several *hundreds*, *towns corporate*, *parishes*, and "*hamlets* were to maintain the poor." By the 1st *Ed.* 6. *c.* 3. "cottages are to be provided for the poor at the costs of *cities*, "*towns*, and *boroughs*, at the devotion of good people." By the stat. 5 & 6 *Ed.* 6. *c.* 2. "the minister and churchwardens are "to ask of *every man and woman* what they will give; and if "any person, being *able*, refuse to give, they are to be exhorted, &c." By the 14th *Eliz. c.* 5. "all and every the inhabitants are to be taxed to the relief the poor, &c." By 18 *Eliz. c.* 3, "a stock of wool is to be provided for employ "of the poor of *all* the *inhabitants* to be taxed and gathered." These expressions give no room to doubt but that the true meaning of these statutes is, that *all inhabitants* of a parish, able either in respect of their real or *personal property* to contribute

* 1 *Burr.* 445.

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to the maintenance of the poor, are intended to be comprized under the deſcription of "perſons liable to that burthen." The firſt remarkable alteration in the terms of thoſe acts is to be found in the 39th *Eliz. c.* 3. *ſect.* 4. where the words "*occupiers* of *land* within the pariſh" are uſed. The reaſon of which introduction was probably on account of certain perſons who claimed to be exempted out of the former ſtatutes, as not reſiding in the pariſh. The word "*inhabitant*" however was ſtill retained. If it ſhould be argued that the word "inhabitant" was retained for any other purpoſe than that of including perſons who were rateable for their *perſonal property*, it is incumbent on the other ſide to ſhew it.

Taking this therefore for granted, that the meaning of the word "*occupier*" was to include perſons who were *owners of land reſiding out* of the *pariſh*, and that the word "*inhabitant*" continued as it did; the next conſideration is the ſtat. 43 *El. c.* 2. *ſ.* 1.

It is the opinion of Dr. *Burn*, that the ſtat. 43 *Eliz. c.* 2. did no more than re-enact the 39 *Eliz. c.* 3. The object of taxation, and the ſubject matter are the ſame in both; but rather more minutely expreſſed in the latter; yet neither the preamble, nor any other part of the latter, ſhews an intention to make a change. The ſame perſons therefore were liable to be rated: And if that ſtatute were now for the firſt time to receive a conſtruction, there could be very little doubt of the expoſition of it. It would be a very violent expoſition of it to ſay, that thoſe perſons alone who are poſſeſſed of real property were liable to be taxed to the poor. The clergy, the merchant, the tradeſman, all benefit by the labour of the poor, as much as the owner and the occupier of land. It is but juſt then, that they ſhould all contribute towards the maintenance of the poor. *Qui ſentit commodum ſentire debet et onus!*—I ſhall next conſider how far this conſtruction of the ſtatute has received a ſanction and been recognized by other ſtatutes. By ſtat. 22 *Car.* 2. *c.* 12. *ſ.* 10. for the repairing of highways and bridges, it is enacted, that "one or more aſſeſſment or aſſeſſments upon all "and every the *inhabitants*, owners and occupiers of lands, "houſes, tenements, and hereditaments, or *any perſonal eſtate* "*uſually rateable to the poor* within any ſuch pariſh, ſhall be "levied, *&c.*"

By ſtat. 2 *Gul. & Mar. c.* 8. for paving and cleanſing the ſtreets in the cities of *London* and *Weſtminiſter*, it is enacted, that for the "better mending of the highways, one or more aſſeſſment or "aſſeſſ-

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" assessments upon all and every the *inhabitants*, owners and occupiers of lands, houses, tenements, and hereditaments, *or any* " *personal estate usually rateable to the poor* within any of the said " parishes, shall be levied, &c." By stat. 3 & 4 *Gul. & Mar.* c. 12. for the repairing and amending highways, it is enacted by *sect.* 18. that " No assessment for the purposes therein declared, shall exceed the rate of six pence in the pound of the " yearly value of lands, houses, tenements, and hereditaments, " &c. nor of sixpence for twenty pounds of *personal estate* " *usually rateable to the poor* within such parish, hamlet, " &c." By stat. 1 *Geo.* 1. *c.* 52. *sect.* 6. for making more effectual the laws for the repair of highways, it is enacted by reference to stat. 3 & 4 *Wil. & Mar. c.* 12. " that the " justices of quarter-sessions, &c. may, if they see fitting, " cause assessments to be made, and money to be raised not " exceeding the proportions limited by the said act."—It is not particularly said what those proportions are; but I consider this statute, as a direct recognition of the 3 & 4 *W. & M. c.* 12. as much as if it had been said so in express words. These several statutes therefore taken together prove, that the legislature has at different times thought *some species of personal property* rateable to the poor: For they in terms speak of "*such personal* " *property* as is *usually rateable to the poor*." But be that as it may, it is enough for the present argument that some sorts of personal property are rateable by the stat. 43 *Eliz. c.* 2. and if it be reasonable that *some* should, nothing can be more reasonable than that *visible property*, such as *stock in trade*, should be so too. Besides this legislative exposition of that statute, there are a variety of authorities which speak the same language.

The first in point of time is the answer of the twelve judges to the 18th *quære* in *Dalt.* justice, *c.* 73. *p.* 231. *Ed.* 1727. This answer says, " that the *land* within each parish is to be " rated, in the first place, to the relief of the poor; but that " there may be an addition for the *personal visible ability* of the " parishioners within that parish."

In Sir *Anthony Earby*'s case, 2 *Bulst.* 354. *A. D.* 1633. upon complaint to the judges of assize by the inhabitants of the town of *Boston* upon an undue assessment made by the said town and overseers of the poor, it was held, and so delivered for law by *Hutton* and *Croke* justices of assize, " that such assessments ought " to be made according to the *visible estate* of the inhabitants " there *both real and personal*." And also, that this has been so resolved by all the judges of *England* upon a reference

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made to them, and upon conference together, when they reſolved, that aſſeſſments for the relief of the poor ought "to "be made in *ſuch manner as before*, according to their *viſible* "*eſtate, real and perſonal*, which they had in the town where "they lived." Now, though the note in *Dalton* be *anonymous*, and may therefore ſeem to want authority; yet it is improbable, that *Bulſtrode* ſhould be miſtaken when he quotes the anſwer of the judges. His reports were publiſhed in 1657, by himſelf. Sir *Robert Heath*, mentioned by *Dalton* to be chief juſtice in 1633, when the anſwer of the judges was delivered, was made ſo in 1631; *Croke* was made a judge in 1628; and *Hutton* in 1617. Taking then the authorities both of *Dalton* and *Bulſtrode* as not to be diſputed, the next caſe in point of time is that of *Rex* verſus *Clerkenwell*, which was as follows: "An order made to confirm a poor's rate, which rate was made "according to the land-tax, was quaſhed. Objected, that this "taxation was not equal, becauſe the perſonal eſtate in the pub-"lic funds is not chargeable to the land-tax, but it is to the "poor: And by the whole court, this rate for that reaſon was "ſet aſide." *Hil.* 2 *Geo.* 1. *B. R. Foley* 23.

The next is the caſe of *Rex* v. *St. Leonard, Shoreditch, Caſ. temp. Holt*, 508. In which the court could not have confirmed the firſt order without recognizing the rateability of perſonal property. Nor the *ſecond*, without holding that the ſeſſions did right in deciding that more equality was proper in taxing the different ſorts of eſtate than had been obſerved.

The next is the caſe of *Regina* verſus *Barkin*, 2 *Lord Raym.* 1,280. where all the judges agreed, that a tradeſman (*artifex*) is liable to be rated for his ſtock in trade. There are various authorities too in *Vin. Abr. vol.* 16. where he refers to *Shaw* and to MSS. caſes. I would refer the court likewiſe to the opinion of Lord *Hale* in his ſcheme of the poor laws; to Dr. *Burn*'s Hiſtory of the Poor Laws; and to the caſes of *Rex* verſus *Guardians of the poor of Canterbury*, *Rex* verſus *The inhabitants of Whitney*, *Rex* verſus *The inhabitants of Ringwood* *, *Rex* verſus *The inhabitants of Andover* †.

More attention ought to be paid to a caſe like this; where a man comes who is rated for *viſible local property within the pariſh*. For it is ſtated as a complaint by an individual of a rate impoſed upon him, who at the ſame time acknowledges, that

* *Supra*, 326. † *Supra*, 550.

if

if perſonal property is rateable, the *proportion* charged upon him is a *juſt* one. And to prove this, I ſhall cite what the court ſaid in the caſe of *Rex* verſus *The inhabitants of Andover*. Lord *Mansfield* ſaid "It is doubtful whether, to the extent in which "it has been argued, perſonal property is rateable or not; if "it were to be ſo without regard to any thing local or viſible, "the watch in a man's pocket, ſoldiers' pay, lawyers' fees, would "be liable, &c. A leſs queſtion is, whether a *man in trade* ſhall "not be rateable for his *ſtock*. To be ſure *ſome perſonal* proper-"ty may be rateable; but then it muſt be *local viſible property* "*within the pariſh*." 1777. REX verſus HILL.

As to the inconveniences that it may be ſuppoſed would attend the rating of it; ſtock in trade in ſome reſpects is rated to the land-tax, as appears from the caſe of *Rex* verſus *Whitney*. But in anſwer to that, I ſhall ſubmit, that if the law authorizes the tax, a difficulty in the mode of levying it can be no objection; beſides the tax is now actually raiſed in many places of this kingdom, in *Lynne*, *Norwich*, *Frome*, *Trowbridge*, *Warminſter*, *Bewdley*, *Blandford*, in many pariſhes of *London*, and in particular that of *Whitechapel*. And how was it formerly in the caſe of the ſubſidies to which the land-tax ſucceeded? *Perſonal* as well as real eſtate contributed towards them; and therefore there muſt have been a mode of aſcertaining each man's abilities to contribute, and the proportion was fixed, as appears in *Gilb. Exch. c.* 14.

From the examination therefore of every writer upon the ſubject, from the ſtat. 43 *Eliz.* and the ſeveral ſtatutes recognizing the conſtruction I have given it, from the authorities in the books, and from the circumſtances of inequality upon any other ground of conſtruction, I ſubmit to the court that this rate is a good one, and ought to be confirmed.

Mr. *Widmore* for the defendant was ſtopped in his argument by a queſtion from Lord *Mansfield*, what the uſage heretofore had been in this place with reſpect to rating ſtock in trade? Mr. *Morris* anſwered that the uſage was waved, and that he and Mr. *Widmore* had agreed at the ſeſſions to bring the general queſtion before the court.

Lord *Mansfield* ſaid they had no right to do ſo: and thought it ought to be ſent back to the ſeſſions to ſtate the uſage. That the highway acts referred to *perſonal* eſtate *uſually* rateable to the poor.

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Mr. Juſtice *Aſton* ſaid, the caſe of the *King* v. *Whitney* was incorrectly reported in *Bott*'s Poor Law, in reſpect of what Mr. Juſtice *Yates* is there mentioned to have ſaid.—That he thought in this caſe the uſage ought to have been ſtated. And accordingly the court ordered the caſe to be referred back to the ſeſſions for that purpoſe.

* *Saturday, Jan.* 31.

Afterwards, in *Hilary* Term * 1778, the caſe being returned, and the quarter ſeſſions ſtating, "That it had been the uſage "heretofore in the pariſh of *Bradford*, to rate perſons there for "their ſtock in trade," the court ordered the rule for quaſhing the rate to be diſcharged, and confirmed the original order of ſeſſions.

REX *verſus* MILLER.

Same day.

If one rent a quantity of land together with a *mineral ſpring* thereout ariſing, at a *groſs* yearly rent, he is rateable to the poor in reſpect of the *whole* of ſuch rent: Tho' *in fact* the annual value of the land, *independent* of the ſpring, is only in proportion of 2 to 8 of the reſerved rent.

MR. *Bearcroft* ſhewed cauſe againſt a rule for quaſhing an order of ſeſſions confirming a poor's rate. The order of ſeſſions ſtated the following caſe: "Upon the appeal of *William* "*Miller* of *Cheltenham*, in the county of *Glouceſter*, Eſq. againſt "a rate or aſſeſſment made for the relief of the poor of the ſaid "pariſh of *Cheltenham*, for that he is unequally rated therein in "reſpect of the *lands* and *buildings* by him rented of Mrs. *Skil-* "*licome*, with all other land, buildings, and houſes in the ſaid "pariſh: This court, having fully heard as well the ſaid *Wil-* "*liam Miller*, as the ſaid churchwardens and overſeers of the "poor of the ſaid pariſh of *Cheltenham*, touching the ſaid ap- "peal, it is ordered by this court, that the ſaid rate or aſſeſſment "be, and is hereby confirmed: The caſe appearing to be, that "Mrs. *Elizabeth Skillicome* of the pariſh of *Cheltenham*, in the "county of *Glouceſter*, by leaſe dated the 20th of *May*, 1776, had "demiſed to the appellant the ſaid *William Miller* of the pariſh "of *Cheltenham* aforeſaid, *certain lands* containing about four "acres, with buildings thereon, *and a certain well* of mineral "water thereout ariſing, called the *Cheltenham Spa*, for the "term of 21 years, determinable at the option of the leſſee at "*ſeven*, fourteen, or one and twenty years, at the *yearly rent* of "*one hundred pounds*. And it further appearing to be, that the "*lands* and *buildings* thereon, independent of the well, are of "the annual value of about *twenty* pounds; that the *rent* paid "by the ſaid *William Miller* for the *mineral water* of the ſaid "well is *eighty pounds*; that the profits of this mineral water to "the leſſee the ſaid *William Miller*, ariſe from the ſale thereof

"and

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"and the company reſorting thereto, which is very various and "*uncertain*; and that the ſaid *William Miller* ſtands rated for "the premiſes aforeſaid in the ſaid rate at the ſum of five "pounds, which is *equal* to a rate of one hundred pounds *per* "*annum* for lands in the ſaid pariſh."

Mr. *Bearcroft* in ſupport of the order of ſeſſions and againſt the rule, obſerved, that the rate in this caſe was an *entire* rate upon the *groſs rent*, paid by the defendant for the premiſes in queſtion; and aſſeſſed upon him in reſpect of ſuch rent: not ſo much for the profits of the water, and ſo much for the land; but an *entire* rate upon the *whole* as *land*: Therefore not diſtinguiſhable from the caſe of any other occupier of land rated in reſpect of his rent. He ſuppoſed however a queſtion would be made on the other ſide, whether mineral water was rateable to the poor: If it were, he ſhould have an opportunity of ſpeaking to it in reply.

Mr. *Dunning* and Mr. *Clifford contra*, in ſupport of the rule contended, that the words of the ſtat. 43 *Eliz. c.* 2. did not include this ſpecies of property: That the rate was not, as had been ſaid, a rate upon the *whole*, as *land*; though the *rate itſelf* did *not diſtinguiſh* between the annual rent of the land and the profits of the ſpring: But the ſeſſions *had* diſtinguiſhed between them, and ſtated the reſpective amount of each: And certainly, the only queſtion meant to be ſubmitted to the court was, "Whether the profits of the *ſpring*, independent of the *ſoil*, "were *eo nomine*, a ſubſtantive matter of taxation?" And they inſiſted it was not. That the uſage with reſpect to other mineral ſprings in different parts of the kingdom, at *Matlock*, *Buxton*, *Scarborough*, *&c.* was the other way. None of them were ever rated; and for this reaſon: Becauſe they are in themſelves fluctuating and uncertain. They may totally ceaſe: And at beſt the profits ariſing from them depend upon the faſhion of the day. Therefore, they are not a ſubject of taxation within the meaning or the words of the ſtat. 43 *Eliz. c.* 2. They cited *Rex* verſus *Vandewall*, 2 *Burr.* 994. *The Governor and Company of ſmelting lead* verſus *Richardſon*, 2 *Bur.* 1,341. and prayed the rule might be made abſolute.

Lord MANSFIELD.—Nothing can be plainer than the preſent caſe. This is not a rate upon the profits of the well, but upon *four acres of land*, let to the defendant at 100*l.* a year; and the value ariſes, partly from the *buildings*, and partly from the ſpring that produces the mineral water. Therefore the profits of the

ſpring

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ſpring are *part* of the *produce* of the *land*. In *Worceſterſhire* and *Cheſhire*, where there are *ſalt* ſprings, the rent of the land is increaſed conſiderably on that account. So here, the conſideration of the *well*, increaſes the rent. It is *part* of the *produce* of the *land*; and therefore, as ſuch, I am clearly of opinion it ought to be rated.

ASTON Juſtice.—I am of the ſame opinion. The rate, in this caſe, is upon the *whole eſtate*, let at 100 *l.* a year. It is true, the juſtices in the caſe ſtated have divided the rent; and ſpecially diſtinguiſhed between the annual value of the land and the profits of the ſpring. But the leſſor and leſſee have made no ſuch diſtinction in the leaſe; and the rate, is upon the whole rent in groſs. Therefore the order of ſeſſions is right.

Per Cur. Rule diſcharged.

Same day.

DOE *ex dim.* FOSTER *verſus* WILLIAMS.

A tenant in poſſeſſion is not a good witneſs to ſupport his landlord's title: becauſe it is to uphold his *own* poſſeſſion.

THIS came before the court upon a rule to ſhew cauſe, why a new trial ſhould not be granted.—Mr. *Dunning* argued in ſupport of the rule, and Mr. *Wallace* againſt it. The argument on both ſides was very ſhort: And as the caſe and objections were fully ſtated by Lord *Mansfield* in delivering his opinion, to avoid repetition I have only ſubjoined the opinion of the court.

Lord MANSFIELD.—This was an ejectment; and an application has been made for a new trial: Whether that application is well grounded or not, muſt depend upon what appeared at the trial.—The plaintiff claimed as nephew and heir at law to a Mr. *Baines* the perſon laſt ſeiſed. The younger ſiſter of the plaintiff, who was produced as a witneſs, proved the pedigree of her two brothers: That they both went beyond ſea. That the plaintiff went to the *Eaſt Indies*, but was not reported to be dead, as the other brother was; and that he lately returned to *England*. Upon the croſs examination ſhe was queſtioned whether the plaintiff was not of the *half-blood* only; to which ſhe anſwered ſhe never had heard of any ſuch thing.—The defendant, who was landlord of the premiſes, and who was ſet up to defend inſtead of the tenant (Mrs. *Pearce*), claimed under a Mrs. *Galton*: And in ſupport of his title a fine was put in, levied by Mrs. *Galton* in the year 1772. At the trial, *Mr. Wallace* on the part of the plaintiff, objected, that the fine alone was not ſufficient, unleſs accompanied with ſome evidence to ſhew that Mrs. *Galton*

was in poſſeſſion at the time of the fine levied, or had received rent. It was admitted that no entry had been made. In order to prove poſſeſſion, Mrs. *Pearce*, the tenant in poſſeſſion, upon whom the ejectment had been ſerved, was called and offered as a witneſs. She was objected to, and at the trial I was of opinion, and upon conſideration am ſtrongly of opinion now, that ſhe was not a competent witneſs. A tenant can never be called as a witneſs to ſupport her own poſſeſſion. Then it was objected by the counſel for the defendant, that, to entitle the plaintiff to bring an ejectment, he ought to have given Mrs. *Pearce* (the tenant) notice to quit. The anſwer given to that was, that the poſſeſſion was *adverſe*; therefore no notice was neceſſary; and I am clearly of opinion there was no occaſion for a notice in this caſe: For the poſſeſſion of the tenant was connected with that of the landlord, which was adverſe.—Then Mr. *Way*, the attorney, was examined, to try to prove Mrs. *Galton* in poſſeſſion by an acknowledgment of payment of rent to her by Mrs. *Pearce*. What he ſaid was, "That before the death of Mrs. *Galton*, he "remembered a converſation between her and Mrs. *Pearce*, in "which, the one admitted ſhe had paid the other rent as her "landlord, and the other, that ſhe had received rent from her as "tenant." But he would not be poſitive to the time ſo as to ſwear it was *before* the *fine* levied. Mr. *Wallace* ſtrongly addreſſed the jury in reply, and began by ſtating that the defendant had no colour of right; and that if he would produce any will or title, he would give up the cauſe. I ſtated to the jury that Mrs. *Galton*, who it ſeems was *Baines's* miſtreſs, had no title. That it did not appear the defendant had any title, but *poſſeſſion*. But if Mrs. *Galton* was in poſſeſſion at the time of levying the fine, then the plaintiff was guilty of a ſlip; however not ſuch a one as would be a bar to him: For as he was beyond ſea at the time of the fine levied, he would not be barred, but might bring another ejectment. That the evidence reſpecting the converſation between Mrs. *Galton* and Mrs. *Pearce* the tenant, was not preciſe and poſitive, whether it was had *before* or *after* the fine levied. But that was matter for their conſideration. The jury found a verdict for the plaintiff. If I had directed the jury to find for the plaintiff, and they had found for the defendant, I would never have concurred in granting a new trial. A new trial ought not to be granted, merely for the ſake of turning the party round; but where ſubſtantial juſtice cannot otherwiſe be obtained. And in the caſe of *Smith ex dim.*

1777.

Doe verſus Williams.

Dormer

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DOE *verſus* WILLIAMS.

Dormer v. *Forteſcue*,* the court under ſuch circumſtances refuſed to grant a new trial.

ASTON, Juſtice.—I am of the ſame opinion. As to the queſtion whether the evidence of Mrs. *Pearce* the tenant in poſſeſſion was admiſſible in ſupport of the defendant's title under whom ſhe held, in *Bourne* v. *Turner*, 1 *Str.* 632. upon a motion to admit the landlord a defendant, upon an affidavit that the tenant in poſſeſſion was a material witneſs for him, the court refuſed it, ſaying, he was liable to the meſne profits, and therefore if the motion were granted it would not make the tenant a witneſs. I have always underſtood that a tenant in poſſeſſion cannot be a witneſs to ſupport his own poſſeſſion. Therefore I entirely agree that the teſtimony of Mrs. *Pearce* in this caſe was properly rejected. As to the other point, the evidence given by Mr. *Way* was very proper to be left to the jury; and in a favourable caſe might have had its effect. Here it was left to the conſideration of the jury, and they have notwithſtanding found for the plaintiff. Therefore the rule muſt be diſcharged.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

Per Cur. Rule diſcharged.

* 2 *Str.* 1,106.

Tueſday, June 10th. A *muſical compoſition* is a *writing* within the ſtat. 8 *Anne. c.* 19. for the encouragement of learning, by veſting the copies of printed books in the authors or purchaſers of ſuch copies, during the times therein mentioned.

BACH *verſus* LONGMAN *et al.*

THIS was a caſe out of *Chancery* for the opinion of this court, ſtating, that the plaintiff about twelve years ago compoſed and wrote a certain muſical compoſition for the harpſichord, called a *Sonata*; and that being deſirous of publiſhing the ſaid work or compoſition, together with other muſical works, compoſitions and writings, he did apply for and obtain his Majeſty's licence, dated the 15th day of *December*, 1763, whereby his Majeſty did grant unto the plaintiff, his executors, adminiſtrators and aſſigns, his royal licence for the ſole printing and publiſhing the ſaid works mentioned in the ſaid licence, for fourteen years from the date of the ſame, as appears by the ſaid licence; and that about four years ago the plaintiff compoſed and wrote another muſical compoſition for the harpſichord, called a *Sonata*; together with an accompaniment for the *Viol di Gamba*; and that the defendants, being muſic ſellers and copartners, had lately obtained copies of the two ſeveral *Sonatas*, muſical works, or compoſitions before mentioned, together with the ſaid accompaniment to the latter: and had lately in the name of

of the said *John Chriſtian Bach*, but without his licence or conſent, printed, publiſhed, and ſold for profit, divers copies of the ſaid two ſeveral compoſitions and accompaniment. And it likewiſe appeared, that it was poſſible to know the muſical compoſitions of any maſter or compoſer of muſick, who had compoſed any quantity thereof. The queſtion was, Whether a *muſical compoſition* is within the ſtatute of the 8th of *Ann. c.* 19. intitled an act for the encouragement of learning, by veſting the copies of printed books in the authors, or purchaſers, of ſuch copies during the times therein mentioned?

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BACH *verſus* LONGMAN.

Mr. *Robinſon* for the plaintiff—Mr. *Wood* for the defendant.

Lord *Mansfield* called on Mr. *Wood* to begin; and without hearing Mr. *Robinſon* in anſwer, ſaid, the caſe was ſo clear and the arguments ſuch, that it was difficult to ſpeak ſeriouſly upon it. The words of the act of parliament are very large: "*Books* "and *other writings*." It is not confined to language or letters. Muſic is a ſcience; it may be *written*; and the mode of conveying the ideas, is by ſigns and marks. A perſon may uſe the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and diſpoſing of them to his own uſe. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All theſe are conveyed by ſigns and figures. There is no colour for ſaying that muſic is not within the act. Afterwards, on *Monday*, *June* 16th, the court certified in theſe words, "Having heard counſel and conſidered this caſe, "we are of opinion, that a muſical compoſition is a *writing* "within the ſtatute of the 8th of Queen *Anne*, intitled an act "for the encouragement of learning, by veſting the copies of "printed books in the authors or purchaſers of ſuch copies, "during the times therein mentioned."

JONES *verſus* WALKER.

Same day.

THIS was a ſpecial action on the caſe, for *money had and received* to the plaintiff's uſe. Plea, *Non aſſumpſit.*—The cauſe was tried at *Weſtminſter*, at the ſittings after *Eaſter* term, 1777, before Lord *Mansfield*, when the Jury found a verdict for the plaintiff, damages 1 *d.* coſts 40 *s.* ſubject to the opinion of

Old-ſtreet is within the *ſuburbs* of the city of *London*, being connected to it by a ſtreet of *contiguous* buildings, *before* the ſtat. 9 *Ann. c.* 10. Therefore the *penny poſt-office* is entitled only to *one* penny for the carriage and delivery of a letter to any of the inhabitants thereof; *viz.* the *penny* paid *upon putting* ſuch letter *into* the *penny-poſt-office*.

the

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the court upon the following case: That by the stat 5 *Ann. c.* 10. intitled "an act for establishing a general post-office," it was enacted "that it should, and might be lawful for the post-master "general, &c. to demand and take for the post of all and every "the letters and packets passing or repassing by the carriage called "the *Penny-post*, established and settled within the cities of *Lon-*"*don* and *Westminster*, and borough of *Southwark*, and *parts* "*adjacent*, and to be received and delivered within *ten English* "*miles* distant from the general letter-office in *London*, *one pen-*"*ny*."—That by the stat. 4 *Geo.* 2. *c.* 33. intitled an act for obviating a doubt which hath arisen concerning the usual allowance made upon the delivery of letters sent by the penny-post, to places *out* of the cities of *London* and *Westminster*, and borough of *Southwark*, and the *respective suburbs* thereof, reciting, that *whereas*, upon the first establishment of the penny-post-office, the carriage of letters by that post was confined to the cities of *London* and *Westminster*, the borough of *Southwark* and the *respective suburbs* thereof; and *whereas*, upon the *application* of the inhabitants of several towns and places within the compass of ten miles round the city of *London*, upon their *voluntary offer* to allow and pay to the messengers or persons carrying such letters, in consideration of their being obliged to travel with a horse to places at that distance, *one penny*, upon the delivery of every letter directed to any person at any place *out* of the cities of *London* and *Westminster* and borough of *Southwark*, and the *respective suburbs* thereof, *over and above the penny* paid upon putting every such letter into the penny-post-office in *London*; the carriage of letters and packets by the said penny-post was *extended ten* miles round the city of *London*; and *one penny* hath been constantly allowed to, and taken by such messengers, on the delivery of every letter directed to every person at any place *out* of the cities of *London* and *Westminster*, the borough of *Southwark*, and the *respective suburbs* thereof, over and above the penny paid upon putting such letter into the penny-post-office in *London*. And reciting, that *whereas*, by reason of the provisions contained in the stat. 9 *Ann. c.* 10. some doubts had arisen, whether the messengers, carrying such letters, could lawfully receive the said penny, over and above the penny paid upon putting such letter into the penny-post-office in *London*; *For obviating and taking away all such doubts*, It was *enacted*, "that nothing, in the said act, should extend to restrain any such "messenger from demanding or taking for every letter originally

"sent

"ſent by the penny-poſt, and not firſt paſſing by the general-poſt, "and from thence tranſmitted by the penny-poſt, which had "been, or ſhould be, delivered, to or for any perſon, at any place "*out* of the cities of *London* and *Weſtminſter*, the borough of "*Southwark*, and the *reſpective ſuburbs* thereof, *one penny*, over "and above the penny paid upon putting every ſuch letter into "the penny-poſt-office."

That the houſe of the plaintiff is ſituate in *Old-ſtreet, in the county of Middleſex*; which ſtreet, *before* the ſtat 9 *Ann.* was *adjoined* to *London* by *contiguous* buildings. That the *liberties* of the city of *London* extend beyond the walls thereof; but that *Old-ſtreet* is *no part* of any of the ſaid *liberties*. That *over and above* the penny paid upon putting in a letter ſent by the penny-poſt to the plaintiff, a penny was *demanded* and paid on the *delivery* thereof. The queſtion was, Whether the *ſecond* penny could be legally *demanded?*

Serjeant *Walker* for the defendant, who was called upon by Lord *Mansfield* to begin, objected 1ſt, that the moſt material, and indeed the only fact to entitle the plaintiff to recover, was *not* ſtated; namely, that the plaintiff lived *within the ſuburbs* of the city. The court therefore could not give judgment for him. 2*dly*. That from the facts that were found, it was clear he did *not* live within the ſuburbs: *Old-ſtreet* being expreſsly ſtated to be *out* of the *liberties* of the city, and *in the county of Middleſex*. That the *liberties* and the *ſuburbs* were *ſynonimous*. But ſuppoſing they were not; *before* the ſtat. 4 *Geo.* 2. *c.* 33. it was mere curteſy to pay the *extra* penny: The uſage therefore, both before and ſince the ſtat. 4 *Geo.* 2. was material to ſhew whether the curteſy extended to this place at the time, and whether it had been ſubmitted to, as a demand, ſince: And there was no doubt but the uſage was with the defendant.

Lord MANSFIELD.—Uſage has nothing to do with the preſent caſe. The ſingle queſtion is, whether "ſuburbs" mean the liberties, or contiguous buildings at the time of the ſtat. 9 *Ann.* For if *Old-ſtreet* had been joined to *London ſince* that time, it would be liable to pay the *extra* penny. One ſide of *Oxford-road* does not pay, becauſe it was *then* joined to *London* by buildings: The other does, becauſe it was at that time open fields. One ſtrong argument againſt its being conſtrued to mean liberties, is, that the ſtatute mentions *Weſtminſter* and the *borough of Southwark*, which have no liberties.

Mr.

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JONES versus WALKER.

Mr. *Buller contra* for the plaintiff. In *Fellows v. Peacock*, *Mich.* 9 *Geo.* 3. MSS. the ſignification of the word "ſuburbs" was ſettled to be, the ſame as the *ſuburbana* of *Rome*. Lord *Mansfield* in that caſe aſked the Recorder, whether "ſuburbs" was the technical term. He ſaid, no: The technical term was "*liberties*." He cited 2 *Vern.* 431. *Stow's Survey*, vol. 2. p. in which *Old-ſtreet* is mentioned as part of the ſuburbs of the city of *London*; and the ſtat. 9 *Ann. c.* 22. for building 50 new churches, in or near the cities of *London* and *Weſtminſter* and the ſuburbs thereof, under which, *Old-ſtreet* church was built.

Lord MANSFIELD.—The ſtatute 9 *Ann. c.* 10. which erected the penny-poſt-office, confines the limits of its delivery to "the "cities of *London* and *Weſtminſter*, the borough of *Southwark* "and the parts adjacent." In proceſs of time, the inhabitants of towns and villages within the compaſs of ten miles of *London*, (*not*, perſons reſident in the contiguous ſtreets and buildings) wiſhing to partake of the benefit of this mode of conveyance, made application to the penny-poſt-office, requeſting it might be extended to them, and, as an inducement to the poſt-office to comply with their requeſt, offered to pay an additional penny a letter, towards defraying the expence of horſe-hire, neceſſary on account of the diſtance. The poſt-office indulged them in it.—After this it became a doubt, whether the receipt of this additional penny for letters thus carried and delivered in the country, could be authorized, conſiſtent with the general proviſions contained in the ſtat. 9 *Ann. c.* 10: and therefore the ſtat. 4 *Geo.* 2. *c.* 33. was paſſed, making it lawful to take an additional penny, for the delivery of any letter to any perſon *out* of the cities of *London* and *Weſtminſter*, the borough of *Southwark*, and the *reſpective ſuburbs* thereof.—The queſtion however, What is meant by "ſuburbs?" ſtill remains; and that is a queſtion of conſtruction upon the act of parliament. At the trial it was contended by the counſel for the penny-poſt-office, that *ſuburbs* mean *liberties*, and have relation to the franchiſes of the city. It was roundly aſſerted by *both* parties, that the uſage and practice was with *them*. Serjeant *Walker*, for the defendant, inſiſted, that the additional penny had always been paid by the inhabitants of *Old-ſtreet*. Mr. *Dunning*, for the plaintiff, that it had not: But no evidence to the fact was produced; the witneſſes on both ſides being out of the way. I thought, and it was acquieſced in and agreed on all hands, that

that it being clear and certain, that *Old-ſtreet* was connected to *London* by a ſtreet of *contiguous* buildings *before* the ſtat. 9 *Ann. c.* 10. the uſage could be of no avail in explaining the ſtatute. If the uſage had been, that a *ſingle* penny only had been taken, in one part of the ſtreet, and the additional penny in another, it might have been material to ſhew, that the one part was antiently contiguous to *London*, and the other originally in the country. The queſtion then, is a mere queſtion of conſtruction, whether the word "ſuburbs" in the act, means the liberties of the city, or contiguous buildings. In all dictionaries, "ſuburbs" are defined to be, "buildings adjoining to a great city, *without* "*the walls*." I thought at the trial, and think now, there is not a colour for ſaying that ſuburbs mean liberties. Liberties are a *corporate* denomination: Suburbs, a *natural* denomination. In *Fellows* v. *Jeacock*, which was the caſe of the *Hampſtead* waterworks, the court were of opinion, that ſuburbs did not mean liberties: And to prove the place in queſtion there, a contiguous building, evidence was given of there being antient pipes, *&c.*—Whether the place in queſtion was or was not a contiguous building at the time of the act, is, as has been ſaid, a matter of *fact*: But when once it is proved to have been a contiguous building, it is a queſtion of conſtruction upon the act. The franchiſes of the city can have nothing to do with the additional trouble of the Penny poſt-man: Whether a houſe ſtood on this ſide or that ſide of *Temple-bar*, within or without the liberty of the city, could make no difference to him. The only matter for his conſideration was, Whether it ſtood amongſt other houſes contiguous to the city, or *without* it, ſo as to occaſion his taking a horſe, the original conſideration for allowing the additional penny.

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ASTON, Juſtice.—The uſage is not material in this caſe. I think that upon the words of the ſtat. 9 *Ann. c.* 10. which ſays, "parts adjacent," it is clear, that the inhabitants of *Old-ſtreet* would be entitled to have the letters delivered for *one penny* only. The confuſion that has ariſen, was introduced by the latter ſtatute, the 4 *Geo.* 2. *c.* 33. changing the words, and uſing "ſuburbs" inſtead of "parts adjacent." It alſo departs from the diſtance mentioned in the ſtat. 9 *Ann. c.* 10. of "ten miles "from the general letter office in *London*," and ſays "within "the compaſs of ten miles *round* the city of *London*," which ſeems to me, to include ten miles beyond the city and the places adjacent where the *old* penny was taken. I think that *before*

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the ſtat. 9th of *Anne*, one penny only could have have been taken in *Old-ſtreet*; and therefore, that the Poſt-office cannot take an additional penny *now*.

WILLES Juſtice.—I think the word "*ſuburbs*" in the latter ſtatute (4 *Geo.* 2. *c.* 33.) means the ſame as "parts adjacent" in the ſtat. 9 *Ann. c.* 10. If it had been the conſtant uniform uſage to receive an additional penny in this place, it might make a difference; but uſage here, is out of the caſe; for none is ſtated.

ASHHURST Juſtice.—I am of the ſame opinion.

Per Cur. Poſtea delivered to the *plaintiff*.

Friday, June 13th.

RUST *et al.* Aſſignees of HENRY and RICHARD PAPPS *verſus* COOPER.

A *pretended ſale*, though of *part* of a trader's goods *only*, to a particular creditor; or any other contrivance *not in the courſe of trade*, but calculated merely to give a *fraudulent preference*, and to defeat the equality of the bankrupt laws, is *void*; tho' the *delivery* of the goods to ſuch creditor, and his *aſſent* to the tranſaction be *complete*, before any act of bankruptcy committed.—But ſuch pretended ſale is *not* in *itſelf* an *act of bankruptcy*: No more is any fraudulent tranſaction, which is *not* a *deed*.

IN *trover* the jury found a verdict for the plaintiffs, damages 378*l.* coſts 40*s.* ſubject to the opinion of the court on the following caſe:

The bankrupts were clothiers at *Saliſbury*; the defendant a linen-draper and banker at the ſame place. The bankrupts were in difficulties all the *Summer* of the year 1772, owing to the failure of *Fordyce* a banker in *London*. The defendant, on the firſt of *Auguſt* 1772, lent the bankrupts 1,000*l.* upon their bond: Their difficulties increaſing, *Richard Papps*, one of the bankrupts, on the 20th of *September* 1772, met Mr. *Samſon Barber* from *London*, who was under large acceptances for the bankrupts, at *Murrel Green*, in *Hampſhire*; where they *agreed* upon a commiſſion of bankruptcy being taken out againſt *Henry* and *Richard Papps*, and that application ſhould be made to one Mr. *Amplias Read* to be petitioning creditor. On *Richard Papps's* return home from *Murrel Green* on *Monday* the 21ſt of *September* at night, buſineſs went on apparently as uſual; but on that night, he told his clerk he ſhould be obliged to ſtop payment in a few days. On *Friday* the 25th of *September* in the afternoon, *Richard Papps* bid his clerk ſhut up his ſhop and not open it next morning; but recollecting himſelf, he bid him open it next morning, for he would wait till the poſt came in; which came in about nine o'clock of the morning of the 26th, when *Richard Papps* ordered the doors to be ſhut, and that he ſhould be denied. He was accordingly denied that day; *before* which time, he had committed *no* act of bankruptcy. *In contemplation of this*, and *in order to give the defendant a preference*, *Richard*

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chard Papps made a bill of parcels to the defendant, bearing date the 22d of *September* 1772, and delivered it to the defendant on the 24th. The bill of parcels with an order to Mr. *J. Elderton* (in whoſe poſſeſſion the goods were depoſited by the bankrupts to ſell for them) to deliver the goods unſold, and to pay the money ariſing from the ſale of ſuch as might have been ſold to the order of the defendant, together with orders to three other perſons to deliver goods in their poſſeſſion to the amount of 684 *l.* to the defendant, were ſent by the defendant expreſs to *Meſſrs. Grace and Kennedy* in *London*; which arrived on the 24th of *September*; and on the 25th the goods in queſtion were delivered by *Elderton* to Meſſrs. *Grace* and *Kennedy*, to the uſe, and as the property of the defendant *Cooper*. The three other perſons delivered no part of the goods in their poſſeſſion. The defendant never dealt in ſuch goods as were in the poſſeſſion of *Elderton*, and at the time of the delivery of the bill of parcels, the bankrupts were inſolvent.

The queſtion was, Whether the plaintiffs were entitled to recover the value of the goods?

Mr. *Wood* for the plaintiffs. The queſtion is, Whether the act done in this caſe, being in *contemplation of bankruptcy*, and with a view to give the defendant a *preference*, was not a fraud upon the reſt of the creditors, and therefore void? Nothing can be clearer, than that the bankrupt laws intended to put all creditors upon an equal footing. And therefore, though in *general*, a trader, *before* any act of bankruptcy committed, has ſuch a property in, and power over, his effects, as to do acts which by conſequence may give one creditor a preference to another; yet, if he is *inſolvent*, or has an act of *bankruptcy* in *contemplation*, he can do no act *out of the uſual courſe of trade*, in favour of a particular creditor. This doctrine is not new, it is eſtabliſhed by a variety of caſes: But more particularly in the caſe of *Alderſon* v. *Temple*, 4 *Bur.* 2,235. and in *Harman* v. *Fiſhar. B. R. Trin.* 14 *Geo.* 3.*—Here, the act done was clearly not in the courſe of trade; not obtained by threats, nor at the inſtance, or importunity of the creditor; but entirely voluntary: And to make an act void, it is not neceſſary it ſhould be fraudulent as between the parties; it is ſufficient if it be a fraud upon the creditors *generally*. It is expreſsly ſtated to be in contemplation of bankruptcy. The petitioning creditor was fixed upon: The bill of ſale antedated; and falſely purporting to be in the *courſe of trade*; whereas, there had been no dealings of this kind between the bankrupt and the

* *Supra*, 117.

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defendant before; and in order to expedite the delivery of the goods before the act of bankruptcy was complete, the bankrupt ſent them by expreſs. The *ſole motive* therefore, was to give a *preference*; and conſequently, though a conveyance of only *part* of his effects, was void in reſpect of the other creditors. He cited *Linton* v. *Bartlett*, *C. B.* from a MSS. note of Mr. Juſtice *Gould*, as expreſsly in point *: And prayed the court to give judgment in favour of the plaintiffs.

* *Vide* this caſe in 3 *Wilſ.* 47. cited alſo in *Harman* v. *Fiſher*, *ſupra*, 217.

Mr. *Peckham contra*, for the defendant. I am to contend that the defendant, being a *bonâ fide* creditor, and payment being made to him *before* any act of bankruptcy committed, has a right to retain what was ſo paid him by his debtor, though by way of preference to him, and in contemplation of bankruptcy: And whether ſuch payment be in *money* or *goods* makes no difference. (Lord *Mansfield*. The difference between *money* and *goods* is immenſe.) Suppoſe the payment had been in bank notes, which in law are not conſidered as money, or payment, any more than a bale of goods; it would not have been void: And here, there was an order to deliver the *money* to the creditor if the goods were ſold. It was by accident only that he received the goods. But he was actually *in poſſeſſion* of *them*, *before* any act of bankruptcy committed; and *poſſeſſion* is the *line* to be drawn. So is *Twine's* caſe, 3 *Co.* 81. It is a good payment therefore at common law: It has none of the characteriſtics of fraud enumerated in *Twine's* caſe; and the bankrupt laws do not extend to it. They only avoid transfers of property to perſons who have no good title or claim. Stat. 34 & 35 *Hen.* 8. *c.* 34.—13 *Eliz. c.* 7.—1 *Jac.* 1. *c.* 15. But this is neither a grant, nor conveyance, nor fraudulent. The proviſion in the ſtat. 21 *Jac.* 1. *c.* 19. *ſect.* 11. which ſubjects goods, conveyed by a bankrupt to perſons upon good conſideration, if left in the bankrupt's poſſeſſion, to be ſold for payment of his debts; proves, that where the *poſſeſſion* is *parted* with, as in this caſe, they ſhall not be ſo liable. The 9th ſection of the ſame ſtatute, which provides that judgment creditors, *&c.* where execution, *&c.* is not *executed*, ſhall be relieved only *pro ratâ* with the reſt of the creditors, favours this poſition: And that diſtinction was adopted by Lord *Mansfield* in *Worſley* v. *De Mattos* †. "It is the policy of the bankrupt laws to level all creditors, who have not actually recovered ſatisfaction, or got hold of a pledge which the bankrupt could not defeat." But here, the tranſaction is founded upon a *good* conſideration; the *property* was actually *transferred* to the defendant; and the *act complete*, *before* the bankruptcy: there-

† 1 *Bur.* 483.

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fore, within the ground of determination alſo in 1 *Str.* 165. *Barwick*'s caſe. Till the poſt came in on the *Saturday*, *Papps* was not certain he ſhould break. The debt is a *bonâ fide* debt, and the conſideration highly meritorious: the money being advanced merely to ſave the bankrupt from ſinking. The aſſignment is of *part* only, and the preference fair at the time: therefore good. *Small* v. *Oudley*, 2 *P. Wms.* 427. and the caſes there cited. *Hague* v. *Rolleſton*, 4 *Bur.* 2,174. *Alderſon* v. *Temple*, 4 *Bur.* 2,235. *Harman* v. *Fiſher*, *Trin.* 14 *Geo.* 3. *B. R.* *—As to the caſe of *Linton* v. *Bartlett*, it is plainly diſtinguiſhable from the preſent, the whole tranſaction there, being manifeſtly fraudulent throughout. Here, fraud is out of the caſe; the preference was made to a *bonâ fide*, and a meritorious creditor, and the act complete. There certainly ought to be a line drawn; otherwiſe, there can be no ſecurity in any dealings. That line can only be legally and properly drawn, where the act is *complete* before the bankruptcy. That being indiſputably the caſe here, the defendant is entitled to retain the goods delivered to him in payment of a juſt demand; and therefore, the plantiffs ought not to recover.

Supra, 117.

Lord MANSFIELD.—Perhaps there is no caſe exactly parallel to this, in all its circumſtances.

This is a caſe, where the aſſent of the creditor to the act of the bankrupt, and the delivery of the goods to the order of the creditor, is complete, before the act of bankruptcy committed; and, further, it is the caſe of an *act* done not of a *deed*. In all its circumſtances therefore, there is perhaps no caſe exactly ſimilar to it. But the law does not conſiſt in particular caſes; but in general principles, which run through the caſes, and govern the deciſion of them. The general principle applicable to the preſent caſe is this; that a fraudulent contrivance, with a view to defeat the bankrupt laws, is void, and annuls the act. This principle is eſtabliſhed by many caſes.

Every caſe that has determined a conveyance by a trader of his *whole* effects to pay a creditor to be an act of bankruptcy, proceeds on this foundation; that it is fraudulent againſt the bankrupt laws, and therefore void. Every caſe which ſays, it is an act of bankruptcy if *one* creditor only is *excepted* out of ſuch conveyance, goes upon the ſame principle. It was long ago determined, that a conveyance of *all a man's effects* was clearly a fraudulent conveyance; and leaving out ſomething, or a part, by way of colour, will not mend it. But the caſe in the *Com-*

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mon *Pleas* * went further than any former caſe; for there, the conveyance of a *third* part of the bankrupt's effects only, and a fair tranſaction with the *party*, was held to be fraudulent and void as againſt the reſt of the creditors; and being *by deed*, was in *itſelf* an *act of bankruptcy*. And no doubt, in that caſe, which was a bill of ſale, if it was fraudulent at all, it muſt likewiſe be an act of bankruptcy. That caſe was well and fully conſidered.

* Linton v. Bartlet, 3 *Wilſ.* 47.

But I am of opinion that no fraudulent tranſaction, which is not a deed, is in itſelf an act of bankruptcy. But then ſuch a tranſaction is void. Where a ſale of goods is fraudulent, and done with no other view whatſoever but to defeat the equality of the bankrupt laws, it is void on account of ſuch intended fraud. I will take to be true, in this caſe, what Mr. *Peckham* has ſaid, that the defendant is moſt probably a meritorious creditor; for the bankrupt, juſt after the failure of *Fordyce*, was in tottering circumſtances; and the defendant on the 1ſt *Auguſt*, 1772, lent him 1,000 *l.* on his bond. It is therefore highly probable to have been a friendly act on the part of the defendant. But ſtill, that will not warrant the tranſaction on the part of the bankrupt, if it is a fraud on the bankrupt laws. Nothing could be more meritorious than the caſe of *Fiſher* † the creditor, in the queſtion which aroſe upon *Fordyce's* bankruptcy. And therefore, the court was ſorry to determine againſt him; but the law muſt prevail for the ſake of example.

† *Vide ſupra*, 217.

Now, let us ſee, whether the tranſaction in this caſe is a mere fraudulent contrivance, with no other view whatſoever but to defeat the conſequences of a certain bankruptcy. In the firſt place, it is ſtated to have been, "expreſsly in contemplation of "that bankruptcy, which was certain; for the bankrupt had "previouſly concerted that a commiſſion of bankruptcy ſhould "be taken out againſt him, knowing he could not ſtand:" and one of the creditors, with whom this was planned, ſaid, at the trial, "he himſelf would have got a preference too, if "he thought by law he could have done ſo." Further, it was agreed that a particular perſon ſhould be the petitioning creditor. When he returned to *Saliſbury*, he continued in the ſame tottering ſituation, and told his clerk he muſt break; he had once reſolved to break on the *Friday*, but he recollected afterwards, that it ſhould not be until the next day: And for this evident reaſon; if he had broken on the *Friday*, he would have become bankrupt too ſoon; for it was as much as ever he could do to get the goods delivered to his friend on the *Friday*. How

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does this caſe ſtand then? Was there any application on the part of the creditor? Was the money become due? Did the creditor demand payment? Did he threaten proceſs if the bankrupt did not pay? Not one of theſe circumſtances appear. On the contrary, the whole was tranſacted behind the back of the creditor: and, without any previous communication, without any previous tranſaction or ſtipulation, a bill of parcels is made out, which bears date on the 22d of *September*, but was not delivered until the 24th. The next thing is, it purports to be a bill of ſale of goods at particular prices. That is not true. No prices were agreed on: The defendant knew nothing of the matter. This bill of parcels is delivered to the defendant upon the 24th. With what view? It muſt be to apprize the defendant that he meant to ſecure him. Again, there is no receipt on the bond. It is impoſſible to conſider this as a ſale; it muſt be a *ſecurity*; a plank to ſave: the goods are to a much larger amount than the principal and intereſt due on the bond. There is nothing that carries the face of a ſale upon it; no receipt, no tranſaction, no acknowledgment in diſcharge of the bond, no account. The whole is a ſecret clandeſtine contrivance, with no other view or intention than to give a preference, and to defeat the conſequences of a certain bankruptcy, though it purports to be a *bonâ fide* ſale.

Another exceſſively ſtrong circumſtance is, that the defendant never bought, or dealt in, this kind of goods; and moreover, they were, at the time, in the hands of the bankrupt's agent.

There is a fundamental diſtinction between an act like this, and one done in the common courſe of buſineſs. The ſtatutes have relation back only to the act of bankruptcy. And I conſider here, that there is no act of bankruptcy till the 26th. If, in a fair courſe of buſineſs, a man pays a creditor who *comes to be paid*, notwithſtanding the debtor's knowledge of his own affairs, or his intention to break; yet, being a fair tranſaction in the courſe of buſineſs, the payment is good; for the preference is there got *conſequentially*, not by deſign: It is not the *object*; but the preference is obtained, in conſequence of the payment being made at that time.

Suppoſe a creditor preſſes his debtor for payment, and the debtor makes a mortgage of his goods, and delivers poſſeſſion; *that* is, and, at any time, may be, a tranſaction in the common courſe of buſineſs, without the creditor's knowing there is

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any act of bankruptcy in contemplation; and therefore, good. It is not to be affected by what paſſes in the mind of the bankrupt. But, in the preſent caſe, there is not a ſingle thing but what is a ſtep towards fraud, and a proof of an intended preference: And to ſupport it, would be to overturn the whole ſyſtem of the bankrupt laws. The preſent therefore, is a fraudulent ſale upon all the other creditors, and all the laws concerning bankrupts.

The preſent determination will not affect the caſe of a fair mortgage of goods delivered, ariſing out of a tranſaction in the common courſe of buſineſs. It will only affect caſes, where there is no object but that of defeating the bankrupt laws, and committing a fraud on all the other creditors.

ASTON Juſtice.—Nothing but a number of authorities cited to throw a cloud over the queſtion, can make one loſe ſight of the fraud in this caſe. It is a mere contrivance betwixt the creditor and debtor. It has been contended to be a payment; but it is clearly no payment, nor ſale. It was a ſudden thought to make out a bill of ſale in form; but, there is no truth in it. The bankrupt had ordered goods to the amount of 600*l.* to be delivered in the ſame way, which would have amounted to more than principal and intereſt upon the bond. If the bankrupt had paid what was due on the bond in bank-notes or money, and had taken up the bond, I think there might be an argument in that caſe, as to the fairneſs of the payment. But this was done without demand; not in a common courſe of dealing; and the bond was left in the hands of the creditor, without any receipt taken upon it. I do not know where ſuch a preference as this is to ſtop. There is no caſe which ſays, a preference ſhall be confined to a ſingle creditor. If a trader may prefer one, he may prefer more. The preſent tranſaction is not in itſelf an act of bankruptcy; but not being a payment in the regular and common courſe of dealing and buſineſs, it is a fraudulent tranſaction, and therefore, void with reſpect to the other creditors.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

Per cur. Poſtea be delivered to the plaintiff.

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RICH, Executor, *verſus* COE *et al.*

Same day.

ASSUMPSIT, for goods ſold and delivered by the plaintiff's teſtator to the defendants; alſo, for work and labour done, materials found, and on an account ſtated. Plea: The general iſſue.—The cauſe came on to be tried at the Sittings after *Eaſter* Term 1777, at *Guildhall*, *London*, before Lord *Mansfield*, when the jury found a verdict for the plaintiff, damages 5 *l.* 8 *s.* 3 *d.* coſts 40 *s.* ſubject to the opinion of the court upon the following caſe:——That *Thomas Rich*, the elder, and *Thomas Rich*, the younger, being rope-makers, did, on the 21ſt of *November* 1772, ſupply the ſhip *Henry* and *Thomas*, with cables, to the value of 5 *l.* 8 *s.* 3 *d.* by the order of *Thomas Harwood*, the captain; and made *Harwood*, and the *owners of the ſhip* (the defendants), debtors in the uſual manner, without naming the owners, or knowing particularly who they were.——The ſhip *Henry* and *Thomas* was *let* by the defendants to *Harwood* upon certain articles, in which it was mutually covenanted between them as follows: 1ſt, The owners covenanted with *Harwood*, that, on his performance of the covenants ſtipulated on his part, he ſhould have the ſole management of the ſhip, and *employ her* for his own *ſole benefit* and advantage, for the ſpace of eleven years, if he ſhould ſo long live, and the ſhip ſhould not be loſt. The covenants, on the part of *Harwood*, were, to pay a *yearly rent* of 36 *l.* *per annum*, at ſtated periods: That he would at all times, at his *own coſt and charge*, *repair*, maintain and keep the veſſel, and her tackle, rigging, *&c.* in good and ſufficient repair: That he would not do or omit any thing, which might ſubject her to be *taken*, *ſeized*, or *forfeited*: with a *proviſo*, that in caſe the ſaid rent ſhould be in arrear for the ſpace of twenty-one days after any of the days appointed for payment; or in caſe *Harwood* ſhould die, or ſhould *not in all things fulfil and keep* all and ſingular *the* ſaid *covenants*, *&c.* then, it ſhould be lawful for the owners to *take poſſeſſion* of the ſhip.—The caſe then ſtated, that neither the plaintiff's teſtator, nor his partner, had any *notice* of this contract at the time they furniſhed *Harwood* the captain, with the goods.—The queſtion was, Whether the defendants were liable to this debt? If the court ſhould be of opinion that the defendants were liable, then the verdict was to be entered up for the plaintiff, with damages 5 *l.* 8 *s.* 3 *d.* and coſts 40 *s.* But if the court ſhould be of opinion

Though the *maſter* of a veſſel, be alſo *leſſee* of it, by agreement with the *owners*, for a *term of years*, under covenants on *their* part, that *he* ſhall have the *ſole management* of the ſhip, and employ her for his own *ſole benefit*, &c. and on *his* part, that he ſhall repair her at his *own ſole coſt* and charge, *&c.* the *owners* are ſtill liable for *neceſſaries* furniſhed for the ſhip by order of the maſter, tho' without their knowledge, or without their being known to the perſon who ſupplied them.

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nion that the defendants were not liable, then a nonſuit was to be entered.

Mr. *Bower* for the plaintiff, inſiſted, that under the circumſtances of this caſe the defendants were clearly liable. That the maſter of a veſſel, from the nature of his employment, is intruſted with more powers to contract for his owners, than any other perſon, who, like him, comes under the denomination of a ſervant. He may pawn the ſhip for neceſſaries: And his general authority is ſuch, that, in caſe of neceſſity, he may do every thing which the owners themſelves could, if they were perſonally preſent. In conſequence of this authority, he gains credit wherever he goes: And perſons in trade, though totally unacquainted with the real owners, truſt him upon the viſible property of the ſhip itſelf. This is the general law and the courſe of trade. The queſtion therefore is, Whether the contract between the maſter and the owners in this caſe, can make any difference. Suppoſing it could, as between the maſter and owners, in reſpect of *third* perſons, it is merely fraudulent and void. He was proceeding to ſhew this, and to enforce it by arguments of inconvenience to trade, if the law were otherwiſe, when the court called upon the counſel on the other ſide to go on.

Mr. *Peckham* for the defendants, began by obſerving, that though the matter in diſpute was very immaterial with reſpect to the preſent parties, the general queſtion involved in it, was of the greateſt moment to the whole county of *Eſſex*; it being almoſt an univerſal cuſtom in that part of the kingdom, for perſons to rent ſhips for the purpoſe of letting them out to hire. He ſaid the queſtion ſeemed to be, Whether the plaintiff was entitled to come upon the defendants, for the value of goods which they had never ordered, and from which they could not poſſibly receive any benefit? Or, Whether he ought not rather to reſort to the maſter of the ſhip, who *did* contract for them; to whoſe order the goods were delivered; who alone was to receive the benefit of them; and to whom alone the credit could have been given, in as much as the owners were entirely unknown to the plaintiff? The principle upon which the law in general holds the owner of a ſhip to be concluded by, and *liable* for, the *contract* of the *maſter* is, that the maſter is conſidered merely as a *ſervant* of the owner without any property in the ſhip itſelf. *Molloy de jure Marit.* 228. "At common law the maſter of a "ſhip has no property, general or ſpecial, by being conſtituted "maſter." But the ſame author, *page* 224. *ſect.* 10. ſays, "If

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"If a *master* take up money to mend or victual the ship, when "there is *no occasion*; though, *generally* the owners shall answer "the fact of the master, yet here, they shall *not*, but only the "master: For it is but reasonable, that the person advancing his "money should take care that he lends it upon such an occasion, "as that the master's act shall bind the owner."—Here then, it was incumbent upon the plaintiff, to see whether this was such an occasion as ought to make the master's act binding upon the owners. And if he had done so, he would upon enquiry have found, that the master in this case, was both master and owner. Indeed, it was almost impossible for him not to have known, that it is the uniform custom in this country for the masters to be lessees of their ships; and to exercise an exclusive right over the vessel during the whole term, without the least interference, interruption, or direction from the owners whatever. As all the cases, which hold the owner to be liable for the act of the master, go expressly upon the ground of the master being merely a servant placed by the owner; the necessary inference in this case is, that being in the *nature* of *owner*, as well as *master*, he *alone* is liable. *Malyne, Lex Mercator.* 102. In *Morse* v. *Slue*, 1 *Mod.* 85. 2 *Lev.* 69. S. C. it was adjudged against the owners, because they received the freight, and the master acted merely as their servant. In this case *Harwood* alone received the freight. In *Boson* v. *Sandford*, 3 *Mod.* 321. 1 *Show.* 29, 103. S. C. Part owners, not privy to the contract of the master, were held liable, "because they took upon themselves the fitting out of "the ship;" and *per Holt*, C. J. "they are chargeable as *em-* "*ploying*, and having the benefit of the voyage; *not* by reason "of their *interest*, because some may disagree." But here, the owners, during the term, can neither take upon themselves the charge of the ship, nor the fitting her out; they cannot meddle with her without subjecting themselves to an action of trespass; they are to have no benefit from the freight or profits of the voyage; nor have even an interest in her till after the expiration of the term. What distinction then can there be, between the lessee of a ship, and a lessee of a house; or the case of a person who lets a coach to hire for a twelvemonth? Neither the landlord nor owner, in such a case, is liable for the repairs to be done by the lessee, or the person hiring the coach. The great ground of distinction in this case is, that the *master, during the term*, is the *owner*; he acts as such in every respect, is universally known and considered as the only person concerned in the conduct, care,

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care, or management of the ship, and therefore ought alone to be responsible.—He concluded with praying that a nonsuit might be entered: But if the court had any doubt, desired it might be spoken to again, as it was a question of great importance, and counsel were attending to take notes.

Lord MANSFIELD.—I am very well satisfied that no addition can be made to the arguments urged on behalf of the defendants. The special case was reserved, not with a view to the particular matter in dispute, or the parties now before the court; but, in consideration of a general anxiety in the owners of ships employed in this trade, to know how far they are by law liable for the acts of their respective lessees. In that point of view, we have considered the case very particularly; and after the fullest deliberation we think it impossible to say, that the plaintiff is not entitled to recover.—Whoever supplies a ship with necessaries, has a *treble* security. 1. The person of the master. 2. The specific ship. 3. The personal security of the owners, whether they know of the supply or not.—1. The master is personally liable, as making the contract. 2. The owners are liable in consequence of the master's act, because they choose him: They run the risk, and they say, whom they will trust with the appointment and office of master. Suppose, the owners in this case had delivered the value of the goods in question in specie to the master, with directions for him to pay it over to the creditors, and the master had embezzled the money; it would have been no concern of the creditors: For they trust *specifically* to the *ship*, and *generally* to the *owners*. In this case, the defendants are the owners; and there happens to be a private agreement between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair, &c. But, how does that affect the creditors, who, it is expressly stated were total strangers to the transaction? And *that* is an answer to the observation, that the plaintiff must have known the real situation of the master in this case, from the general usage and custom of the country in that respect. To be sure, if it appeared that a tradesman had notice of such a contract, and, in consequence of it, gave credit to the captain individually as the *responsible person*, particular circumstances of that sort might afford a ground to say, he meant to absolve the owners, and to look singly to the personal security of the master. But here it is stated, that the plaintiff had no notice whatever of the contract. The owners themselves are aware of their being liable at the time.

time. They chuſe a maſter to whom they agree to let the ſhip; and truſt for their ſecurity to the covenants which they oblige him to enter into. Theſe covenants are, that he ſhall keep the ſhip in repair, and deliver her up at the end of the term, in as good condition, as when delivered to him. This is not all: for they indemnify themſelves againſt the private debts of the maſter; and againſt his being taken in execution: For, if he does not perform all and every the covenants in the agreement (except in caſe of the loſs of the ſhip), the conſequence, beſides their remedy againſt him upon the covenant, is, that the contract and agreement is to be abſolutely at an end, and they are to take poſſeſſion of the ſhip. 1777. RICH. verſus CON et ale.

Suppoſe the ſhip had been impounded in the *Admiralty Court*, and *that* had happened at the end of the term; or, ſuppoſe the captain had then broken a covenant which had put an end to the agreement, the defendants could never have taken the ſhip out of the court, without paying the debt for which the ſhip was impounded. We are all of opinion therefore, that under theſe circumſtances there is no colour to ſay that the creditors ſhould be ſtript of the general ſecurity they are by law entitled to againſt the owners.

Per cur. *Poſtea* to be delivered to the plaintiff.

CREPPS *verſus* DURDEN *et al.*

Saturday, June 14th.

THIS was an action of treſpaſs brought by the plaintiff againſt the defendants, for breaking into his houſe and taking away his goods and converting them to his own uſe: To this the general iſſue was pleaded, and the cauſe came on to be tried at *Weſtminſter*, before Lord *Mansfield*, at the Sittings after *Eaſter* Term 1777; when a verdict was found for the plaintiff, for *three* ſeveral ſums of *five ſhillings* each, and coſts 40*s.* ſubject to the opinion of the court upon the following caſe:— "That the plaintiff was convicted of ſelling *ſmall hot loaves of* "*bread*, the ſame not being any work of charity, on the *ſame* "day (being *Sunday*)" by *four ſeparate* convictions, which were as follow: "*Weſtminſter* to wit. Be it remembered, That on "the 10th of *November*, 1776, *Peter Crepps*, of, *&c.* baker and "ſalter of bread, is lawfully convicted before me *Jonathan Dur-* "*den*, one of his Majeſty's Juſtices of the Peace for the ſaid city "and liberty of *Weſtminſter*, for unlawfully doing and exerciſing

A perſon can commit but *one* offence on the *ſame* day, by "*exerciſing* "*his ordi-* "*nary cal-* "*ling on a* "*Sunday*," contrary to the ſtat. 29 *Car.* 2. *c.* 7. And, if a juſtice of peace proceed to convict him in *more* than *one* penalty for the *ſame* day, it is an exceſs of juriſdiction for which an action will lie, *before* the convictions are quaſhed.

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656. every act previous to the conviction is set out, as well as the conviction itself. If this case had happened before the stat. 7 *Jac.* 1. *c.* 5. which enables justices of peace to plead the general issue, and to give the special matter in evidence, the defendant must have specially set forth every stage of the proceedings upon the record, and the omission of any one fact would have been fatal: or, if upon the face of the record it had appeared the conviction was illegal, it would have been a good cause of demurrer. Since the statute, his defence must be equally good in evidence: for the statute does not vary the law; it only meant to ease the justice from the difficulty and risk of special pleading. Even in cases where the legislature gives a summary form of conviction, and where no summons is necessary, the justices must pursue the form prescribed, or it will be fatal.—*Secondly*, upon the *merits*: The words of the stat. 29 *Car.* 2. *c.* 7. are, "that no tradesman or other person shall do or "exercise any worldly labour, business, or work of their ordinary calling on the *Lord's day*, works of necessity and "charity only excepted." In *Rex* v. *Cox*, 2 *Bur.* 786. the court held "that *baking puddings* and *pies* was within the exception;" and if so, why should not the baking *rolls* be so too? But what is decisive is, that the statute 29 *Car.* 2. *c.* 7. gives no summary form of conviction; whereas, the convictions produced barely state that the plaintiff was convicted, without any information, summons, appearance, or evidence being stated. In point of *form* therefore, all *four* are bad.—*Lastly*, supposing they were good in form, the *three* last are an *excess* of the justice's jurisdiction: for the offence created by the statute is, "exercising his calling on the *Lord's day*." If the plaintiff therefore had continued baking from morning till night, it would still be but *one* offence. Here, there are four convictions for one and the same offence; consequently, as to three, there is an excess of jurisdiction: and if so, all is void, and *coram non judice*; and an action will lie, not only against the justice, but likewise against the officers. To this point he cited *Hardres* 484. and concluded by praying judgment for the plaintiff.

Mr. *T. Cowper contra*, for the defendant, contended, 1. That by the bare production of the conviction at the trial, the cause was at an end, and the court estopped from any further enquiry. That it was the general apprehension and prevailing opinion of the profession, founded in constant practice, that a conviction

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viction, in a matter of which the juſtice had juriſdiction, muſt be removed by *certiorari* and quaſhed, before it can be queſtioned at *niſi prius*. If he has no juriſdiction, no doubt but all is *coram non judice*, and void. But here, the juſtice had juriſdiction; and if ſo, with deference to the opinion of Mr. Juſtice *Gould*, in the cauſe tried before him in *Shropſhire*, the conviction, as to the *matter of fact* contained in it, is *concluſive* in favour of the juſtice in an *action*, though it is not ſo in an *information*. If it were not, inſtead of the miſchief to be apprehended from the oppreſſion of the juſtice, no one would act in the commiſſion. 2. As to the objections which have been taken to the convictions in point of form, he ſaid, it would be time enough to anſwer them, when the convictions were removed and ſtood in the paper for argument. At preſent, it was ſufficient to obſerve, that they continued as ſo many *judgments on record*, and, as ſuch, *concluſive*, till reverſed by appeal, or quaſhed by this court. He agreed the ſtat. 7 *Jac.* 1. *c.* 5. did not vary the law: But inſiſted, that *before* that ſtatute, it would have been a good plea for the defendant to have ſtated, that the plaintiff was convicted, &c. as in this caſe; and if the plaintiff had traverſed the conviction, the defendant might have demurred. The ſole ground and object of taking away the *certiorari* in the ſeveral acts of parliament for that purpoſe, was to prevent vexatious ſuits againſt juſtices for mere informalities in their proceedings. But they ſtill remain liable to an information if they wilfully act wrong. This court has often lamented, when obliged to quaſh a conviction for want of form, becauſe it opens a door to an action.

As to this being but *one* continued offence, it might be, that it was carried on at four different places; for there is evidence of four different acts, and the court will not preſume the contrary againſt the juſtice. But, if the nature of the offence is ſuch, that it could only be committed *once* in the ſame day, ſtill the plaintiff has no remedy while the convictions are in force, but by removing them into this court to be quaſhed for illegality.

Lord MANSFIELD.—May there not be this point, that the juſtice had *no juriſdiction after* convicting the plaintiff in the *firſt* penalty? The act of parliament gives authority, to puniſh a man for exerciſing his ordinary calling on *Sunday*. The juſtice exerciſes his juriſdiction, by convicting him in the penalty for ſo doing. But then, he has proceeded to convict him for three other offences

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on the ſame day.——Mr. *Cowper.* If he has done ſo, it is only a ground for quaſhing the convictions: But no priority appears, to give legality to one in preference to the other.—Lord *Mansfield.* This point you agree in; that if the juſtice had no juriſdiction, it is open to enquiry in an action: Now, if there are *four* convictions, for *one* and the *ſame* offence committed on *one* and the *ſame* day, *three* of them muſt neceſſarily be *bad*; and if ſo, it does not ſignify as to the merits of the action, which of the four is legal, or which illegal.

I do not remember that at the trial it was contended, that the plaintiff would be entitled to recover if the convictions were informal: Or, that any objection was taken to their formality there. The ſingle queſtion intended to be tried was, Whether there could be more than one penalty incurred, for exerciſing a man's ordinary calling on one and the ſame *Sunday.* As to that, there can be no doubt: The only doubt was, Whether that objection could be taken at the trial, before the convictions were quaſhed. In the extent in which the argument upon that point has proceeded, it is a matter of conſiderable conſequence; and, as a general queſtion, I ſhould be glad to think of it.

ASTON Juſtice.—The court will never grant an *information*, unleſs the conviction is quaſhed. *Rex* v. *Heber.* 2 *Str.* 915. As to the general queſtion before the court, ſuppoſe the juſtice were to convict for a ſingle offence, where no offence at all had been committed; would not an action lie in that caſe? If it would, why not in this, where there are four convictions for one and the ſame offence? It ſeems to me, that the baking every roll might as well have been charged as a ſeparate offence.

Cur. adv. vult.

Afterwards, on *Wedneſday, June* 18th in this term, Lord *Mansfield*, after ſtating the caſe at large, delivered the unanimous opinion of the court as follows: Upon the trial of this cauſe, no objection was made to the formality of the convictions: I doubt whether they were read, and for this reaſon; becauſe, by the ſtate I have of them, they appear different from the warrants: For the *convictions* take *no* notice of any ſummons, nor of any informations, nor of any evidence upon oath given; though the *warrants* take *notice* of a ſummons, of the defendant's not appearing to that ſummons, of an information laid, and evidence given upon oath. This objection would have gone to *all* the *four* caſes equally; but, at the trial, no objection whatever

ever was made to the first conviction or warrant. But the objection made was this; that, allowing the first conviction and warrant to be good, the *three* others were an *excess* of the jurisdiction of the justice, and beyond it: For that on the true construction of the stat. 29 *Car.* 2. *c.* 7. there can be but one offence, attended with one single penalty, on the same day. 1777. CRIPPS *versus* DURDEN.

In answer to this it was objected, on the part of the defendants, that *no* such *objection* could be taken to the convictions till after they had been *quashed* in this court; and that if a case were to be made with regard to that, it must be taken upon the question; Whether, according to the true construction and meaning of the act, the party could be guilty of repeated offences on one and the same day? Therefore, the questions stated for the opinion of the court on the present case are, first, "Whether in this action, and *before* the convictions were *quashed*, an objection could be made to their legality? If the court "should be of opinion no objection could be made, then a non-"suit to be entered up: but, in case the objection might be "made, then, 2dly, Whether the levy made under the *three last* "warrants could be justified?" The first question is, "Whether any objection can be made to the legality of the convictions before they were quashed?" In order to see whether it can, we will state the objection: It is this; that here are *three* convictions of a *Baker*, for exercising his trade on *one* and the *same* day; he having been before convicted for exercising his ordinary calling on that identical day. If the act of parliament gives authority to levy but *one* penalty, there is an end of the question, for there is no penalty at common law. On the construction of the act of parliament, the offence is, "exercising his ordinary "trade upon the *Lord's day*;" and *that*, without any fractions of a day, hours, or minutes. It is but *one* entire offence, whether longer or shorter in point of duration; so, whether it consist of one, or of a number of particular acts. The penalty incurred by this offence is, *five shillings*. There is no idea conveyed by the act itself, that, if a taylor sews on the *Lord's day*, every stitch he takes is a separate offence; or, if a shoe-maker or carpenter work for different customers at different times on the same *Sunday*, that those are so many separate and distinct offences. There can be but one entire offence on one and the same day: And this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day: Killing a single hare is an offence; but the killing ten more on

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the ſame day will not multiply the offence, or the penalty impoſed by the ſtatute for killing one. Here, repeated offences are not the object which the legiſlature had in view in making the ſtatute: But ſingly, to puniſh a man for exerciſing his ordinary trade and calling on a *Sunday*. Upon this conſtruction the juſtice had no juriſdiction whatever in reſpect of the three laſt convictions. How then can there be a doubt but that the plaintiff might take this objection at the trial? 2dly. With regard to the form of the defence, though the ſtat. 7 *Jac.* 1. *c.* 5. enables juſtices of peace to plead the general iſſue and give the ſpecial matter in evidence; in doing ſo, it only allows them to give *that* in evidence, which they muſt *before* have *pleaded*; and therefore, they muſt ſtill juſtify. But what could the juſtification have been in this caſe, if any had been attempted to be ſet up? It could only have been this: That becauſe the plaintiff had been convicted of one offence on that day, therefore the juſtice had convicted him in *three* other offences for the ſame act. By law that is no juſtification: It is *illegal* on the *face* of it; and therefore, as was very rightly admitted by the counſel for the defendant in the argument, if put upon the record by way of plea, would have been bad, and on demurrer muſt have been ſo adjudged. Moſt clearly then it was open to the plaintiff upon the general iſſue, to take advantage of it at the trial. The queſtion does not turn upon niceties; upon a computation how many hours diſtant the ſeveral bakings happened; or upon the fact of which conviction was prior in point of time; or that for uncertainty in that reſpect, they ſhould all four be held bad: But it goes upon the ground, that the offence itſelf can be committed only once in the ſame day. We are therefore all clearly of opinion, that if there was no juriſdiction in the juſtice, the ſame might have appeared at the trial: Of courſe, we are of opinion, that this objection might have been made, and that the objection itſelf, in point of law, is well-founded.

Per Cur. Poſtea to be delivered to the plaintiff.

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Saturday, *June* 14th.

REX *verſus* BALME *et al.*

The power of two juſtices, under the ſtat. 13 *Geo.* 3. *c.* 78. *ſect.* 16. to order ANY *highway* to be *widened*, extends to roads repairable *ratione tenuræ*; and, upon diſobedience to ſuch order, the party may either be proceeded againſt ſummarily under the ſtatute, or by indictment.

THIS was an indictment againſt the defendants, who were ſurveyors of the high-way for the townſhip of *Bradford*, in the county of *York*, for *diſobedience to an order of two juſtices* made upon them purſuant to the ſtat. 13 *Geo.* 3. *c.* 78. intitled, "an act to explain, amend, and reduce into one act of parliament, the ſeveral ſtatutes now in being for the amendment and "preſervation of the *public highways*, *&c.*"—The 16th ſection of the ſtatute, empowers two juſtices, upon view, to order *narrow* highways to be *widened* and enlarged. The indictment accordingly ſtated, "that two juſtices did, upon view, make ſuch an "order, and that the defendants wilfully and contemptuouſly "neglected and refuſed to obey it." The defendants pleaded, that certain perſons particularly named in the plea, were bound *ratione tenuræ* to repair the ſaid highway, and had always uſed and been accuſtomed to repair it; and that, inaſmuch as the inhabitants of the townſhip of *Bradford*, at the time of making the ſaid order, were not, nor are liable to repair the ſaid highway, or any part of it, the ſaid order was, and is void, and of no effect. To this, there was a demurrer, and joinder in demurrer.

Mr. *Wood pro rege*, ſtated the queſtion to be, whether the ſtat. 13 *Geo.* 3. *c.* 78. empowers juſtices to widen roads repairable by private perſons *ratione tenuræ*; and he contended it did. That the words of the 16th ſection, by which this power is particularly given, were *general*; "that if it ſhall appear upon "view of two or more juſtices, *&c.* that the ground or ſoil "of *any highway* between the fences thereof is not of ſufficient "breadth, they may order it to be *widened* and enlarged, or "*diverted* and *turned*:" Conſequently it muſt extend to roads repairable *ratione tenuræ* as well as to other highways. But, by ſection 23. it is quite clear; for *that* expreſsly provides "that "the juſtices, upon information by the ſurveyor, that any "highway liable to be repaired *ratione tenuræ* is out of repair, "may order it to be repaired within a limited time, *&c.*" They have clearly therefore a juriſdiction over ſuch roads, and the act was meant to extend to them. But if the court ſhould entertain a doubt upon the conſtruction of this act, the ſtat. 13 *Geo.* 3. *c.* 84. (the general turnpike act) has, by reference to the ſtat. 13 *Geo.* 3. *c.* 78, ſhewn what the powers of the juſtices

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REX versus BALME.

by that ſtatute are. For in ſect. 62. after reciting, that "whereas "many perſons are liable by tenure, &c. to repair certain *high-* "*ways* which have *become turnpike* roads, and therefore are "liable to *additional expence* in repairing them;" it provides, "that "the truſtees ſhall contribute towards the expence out of the "tolls, &c." And in the next ſection (63.) reciting, that "whereas "parts of highways, &c. have been *diverted* by legal authority, and "doubts have ariſen, or may ariſe, whether the inhabitants of "any pariſh liable to repair the old highway by ſtatute duty, "*tenure*, or otherwiſe, ought to repair or contribute thereto, &c." to obviate ſuch doubts, it enacts, "that ſuch perſons ſhall be "liable to repair ſo much of the new highway as ſhall be equal "to the burthen of the old, &c." This is *deciſive*; for though this latter ſtatute does not uſe the words "*widen* and *enlarge*," yet the ſection of the ſtat. 13 *Geo.* 3. *c.* 78. to which it refers in reſpect of the power of diverting roads, is the very ſection which empowers the juſtices to widen and enlarge roads that are too narrow. It would be too much therefore to ſuppoſe, that the legiſlature meant to give the juſtices a power in the one caſe, and to reſtrain them from interfering in the other. He prayed judgment therefore for the crown.

Mr. *Chambre contra*, for the defendant, contended, that the proviſions of the ſtat. 13 *Geo.* 3. *c.* 78. relative to the widening narrow highways, did not extend to roads repairable by private perſons *ratione tenuræ*. 1ſt, The words of ſect. 15. are confined to caſes where "the ground between the fences will admit of "the width directed by the ſtatute, and where the road leads to "a market-town." Sect. 16. makes no mention of roads repairable *ratione tenuræ*: And as to ſect. 33. it provides only for the *repair* of ſuch roads, but ſays nothing of their being widened. There is not a word therefore in the act which relates to it. With reſpect to the clauſes that have been cited from the ſtat. 13 *Geo.* 3. *c.* 84. they relate only to turnpike roads, the direction and management of which is veſted in truſtees, and ſpecial powers are given them for that purpoſe. The juſtices have no juriſdiction in ſuch caſes. But 2dly, Suppoſing they had; there is a particular proviſion by the ſtat. 13 *Geo.* 3. *c.* 78. *ſect.* 50. impoſing a fine not exceeding 5 *l.* nor leſs than 10 *s.* in caſes where no particular penalty is before impoſed: And no particular penalty is impoſed in this caſe. Therefore this proviſion ought to have been purſued, and not the remedy by indictment.

Lord

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Lord MANSFIELD—As to the mode of profecution, difobeying an order of juftices is a common law offence, and therefore punifhable by indictment.

The next queftion is, Whether the order of juftices is legal? It would be a ftrange conftruction of the ftatute, if it were not. By the general turnpike act 13 *Geo.* 3. *c.* 84. *fect.* 63, if a perfon is liable to repair a road *ratione tenuræ*, and the road is *diverted* under the ftat. 13 *Geo.* 3. *c.* 78. *fect.* 16, fuch perfon is to contribute towards the repair of it when diverted, in equal proportion to what he was liable to before. Now the very fame *fect.* (16.) that empowers the juftices to *divert* or turn an old road, gives them likewife a power of *widening* fuch as are too narrow: It would be monftrous therefore to fay, that when the legiflature was directing that perfons, liable *ratione tenuræ* to repair roads diverted, fhould contribute in the fame proportion as formerly, they did not mean they fhould contribute towards widening fuch as required widening.

ASTON Juftice.—I am of the fame opinion. The 15th fection of the ftat. 18 *Geo.* 3. *c.* 78. is *compulfory* upon the furveyors "to "make every public cartway leading to any market-town, twenty "feet wide, *&c.* if the ground between the fences will admit of "it." Can there be a doubt then, if fuch road were repairable *ratione tenuræ*, that the perfon liable before, would be ftill liable in the proportion he formerly was? The next claufe (fect. 16.) is not confined to a road leading to a market town, but is *general*; "if *any* highway, *&c.*" Thefe words are clearly large enough to include *all* roads.—As to the mode of profecution, there is no doubt but the juftices may proceed fummarily under the act if they think proper: But they may elect to profecute at common law; for difobedience to an order of juftices is an offence at common law. The penalty given by the ftatute is only accumulative. And he cited *Rex* v. *Robinfon*, 2 *Bur.* 799.

Per Cur. Judgment *pro Rege.*

THE END OF TRINITY TERM.

1777. # MICHAELMAS TERM

18 GEORGE III. *B. R.* 1777.

Tuesday Nov. 11th.

ADAMS *verſus* ADAMS *et al.*

THIS was a caſe out of *Chancery* for the opinion of this court, ſtating in ſubſtance as follows: That *Francis Freeman* died inteſtate *before* the year 1758, leaving two daughters, his only children and *coheirs* at law, *viz. Frances*, afterwards the wife of *Shute Adams*, and *Catherine*, the wife of Sir *Oneſiphorus Paul*, and ſeiſed in fee of the eſtate in queſtion, and of other real eſtates.

1758, *November* 3.—By indenture between the ſaid Sir *Oneſiphorus Paul* and *Catherine* his wife, and *Shute Adams* and *Frances* his wife, of the one part, and *Joſeph Bliſſet* and *John Taylor* of the other part, the ſaid Sir *Oneſiphorus Paul* and *Shute Adams* did covenant, that they and their ſaid wives ſhould levy three or more fines (and which were accordingly levied) of all the ſaid eſtates to the following uſes; (that is to ſay) "As to *one undivided moiety* to the *uſe* of ſuch perſon or perſons, for ſuch eſtate or "eſtates, and for ſuch uſes as the ſaid Sir *Oneſiphorus Paul* and "*Catherine* his wife ſhould by any deed or writing jointly limit "or appoint; and in default of appointment, to particular uſes "therein mentioned. And as to the *other half part*, to the *uſe* "of *ſuch perſon* or perſons, *for ſuch eſtate* or eſtates, as the ſaid "*Shute Adams* or *Frances* his wife, by any *deed* or *writing* to be "by them *jointly* executed in the preſence of two witneſſes, ſhould "from time to time direct and appoint; and for *want of ſuch* di-"rection and *appointment*, to the uſe of the ſaid *Shute Adams for* "*life*, remainder to ſaid *Frances for life*, remainder to *Joſeph Bliſ-*"*ſet* and *John Taylor* and their heirs for the life of the ſur-"vivor of *Shute Adams* and *Frances* his wife, *in truſt* to pre-"ſerve

"ſerve contingent remainders; remainder, to the uſe of *ſuch* "*child or children*, by the ſaid *Shute Adams* on the body of the ſaid "*Frances* begotten or to be begotten, and *for ſuch eſtate* or eſtates "as they ſhould *jointly*, or as the *ſurvivor*, in caſe of no joint ap- "pointment, ſhould by *deed* or *writing*, or as the ſurvivor ſhould "by *will* atteſted by three witneſſes, limit, direct, or *appoint*, "give or *deviſe* the ſame; and for want of ſuch direction or "appointment, gift or deviſe, to the uſe of the *firſt* and *every* "*other ſon* of the ſaid *Shute Adams* and *Frances* his wife, ſeverally "and ſucceſſively in tail; remainder, to all the daughters of the "ſaid *Shute Adams* and *Frances* his wife in tail, as tenants in "common. Remainder, to ſuch perſon or perſons as the ſaid "*Frances Adams*, whether covert or ſole, by any deed or deeds, "ſhould releaſe, direct or appoint; and in default of ſuch ap- "pointment, to the right heirs of the ſaid *Frances*."

1758, *November* 29th.—By deed poll under the hands and ſeals of *Shute Adams* and *Frances* his wife atteſted by two witneſſes, reciting the ſaid firſt mentioned power of appointment in the deed of the 3d of *November*, 1758, the ſaid *Shute Adams* and *Frances* his wife *did* direct and *appoint* the ſaid undivided moiety of the ſaid eſtates and premiſes, to the uſe of the ſaid *Shute Adams for life*, remainder to *Frances* his wife *for life*, remainder to *Joſeph Bliſſet* and *John Taylor* and their heirs to ſupport contingent remainders, remainder to the *uſe of ſuch child or children* of the ſaid *Shute Adams* on the body of the ſaid *Frances* begotten or to be begotten, *and for ſuch eſtate or eſtates* as they ſhould *jointly* by deed or writing atteſted by two witneſſes, or as the *ſurvivor* in caſe of no joint appointment ſhould by *deed* atteſted by two witneſſes, or *will* atteſted by three witneſſes, grant releaſe, limit or *appoint*, give or *deviſe* the ſame: And in *default* of ſuch appointment, to *all ſuch children living at the death of the ſurvivor* of ſaid *Shute Adams* and *Frances* his wife, equally as tenants in common in tail, with croſs remainders amongſt them; remainder, to the uſe of ſaid *Shute Adams* and *Frances* his wife, and the ſurvivor, and the heirs and aſſigns of the ſurvivor for ever—With a *power* in *Shute Adams* and *Frances* his wife *jointly* by deed with two witneſſes, to *revoke* the above uſes, and to limit any other uſes by deed executed in the preſence of two witneſſes. And a *power* in the *ſurvivor* to *join* in a *partition* of the premiſes, or to ſell the ſaid undivided moiety, inveſting the money in other lands to be ſettled to the ſame uſes.

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ADAMS *versus* ADAMS.

1764, *September* 24th.—By articles of agreement between Sir *Oneſiphorus Paul* and dame *Catherine* his wife, of the firſt part, and *Shute Adams* and *Frances* his wife, of the other part, reciting as therein it was recited, it was agreed, and the ſaid Sir *Oneſiphorus Paul* and *Catherine* his wife, *Shute Adams* and *Frances* his wife, did thereby ſeverally and reſpectively limit, order, direct and appoint, that all the premiſes in *Clifton* and *Weſtbury* upon *Trym* ſhould be, and remain to, and for ſuch and the like uſes, truſts, intents and purpoſes as were mentioned with reſpect to them the ſaid *Shute Adams* and *Frances* his wife concerning their or the ſaid *Frances*'s undivided moiety of the whole of Mr. *Freeman*'s eſtate, by the ſaid indenture dated the *third* day of *November* 1758, made between the ſaid Sir *Oneſiphorus Paul* and his wife, and the ſaid *Shute Adams* and his wife, of the one part, and the ſaid *Joſeph Bliſſet* and *John Taylor* of the other part. And it was alſo agreed, that the other eſtates ſhould be limited, *&c.* to the ſame uſes as were mentioned with reſpect to the ſaid Sir *Oneſiphorus Paul* and dame *Catherine* his wife, concerning their ſhare of the ſaid eſtates by the ſaid deed dated the 3d day of *November* 1758. And that a proper deed or deeds, for dividing and allotting the ſaid eſtates, agreeable to the intention of the ſaid parties, ſhould be forthwith prepared and executed by the ſaid parties: neither of the deeds of 3d of *November* and 29th of *November* 1758, was recited in theſe articles, or mentioned therein otherwiſe than as aforeſaid.

1761, *October* 20th—By indenture between Sir *Oneſiphorus Paul* and dame *Catherine* his wife, and *Shute Adams*, Eſq; and *Frances* his wife, of the one part, and *Joſeph Bliſſet* of the other part, reciting the indenture of the 3d of *November*, 1758, (but not the indenture of the 29th of *November*, 1758,) and alſo reciting the ſaid diviſion of the premiſes; *Oneſiphorus Paul* and dame *Catherine*, in conſideration of five ſhillings paid by the ſaid *Shute Adams* and wife, and of five ſhillings paid by *Joſeph Bliſſet*, by virtue of all powers in the ſaid indenture of the 3d of *November* 1758, and of all other powers, did by conſent, direction and appointment of the ſaid *Shute Adams* and wife, limit, direct and appoint unto the ſaid *Joſeph Bliſſet*, his heirs and aſſigns, "All the undivided moiety of them the ſaid *Oneſiphorus* "*Paul* and dame *Catherine* his wife, of and in the eſtate at *Clifton* "and *Weſtbury* upon *Trym*, *to hold* unto the ſaid *Joſeph Bliſſett*, "his heirs and aſſigns for ever, to the ſeveral *uſes* following, "*viz.* To the uſe of ſuch perſon or perſons, and for ſuch eſtate or "eſtates,

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"eſtates, as the ſaid *Shute Adams* and *Frances* his wife ſhould by "any deed or writing from time to time releaſe or appoint, and "in default of ſuch joint appointment, which was the caſe, to "the uſe of the ſaid *Shute Adams* for his life. Remainder to "*Frances* his wife, for her life; remainder to *Joſeph Bliſſet* and "his heirs, to preſerve contingent remainders; remainder to "the uſe of ſuch child or children of the ſaid *Shute Adams*, be-"gotten or to be begotten on the body of the ſaid *Frances* his "wife, and for ſuch eſtate or eſtates as they by deed or writing "under both their hands and ſeals, or as the ſurvivor of them, "in caſe of no joint appointment, by deed or writing under "the hand and ſeal of ſuch ſurvivor atteſted by two witneſſes, "or as ſuch ſurvivor by will ſhould limit or appoint; and if no "appointment, then to their firſt and other ſons in tail; re-"mainder to the daughters, as tenants in common in tail, with "croſs remainders; remainder to the uſe of ſuch perſons as "the ſaid *Frances*, whether covert or ſole, ſhould appoint: "remainder to the right heirs of the ſaid *Frances Adams*." Soon after this, *Shute Adams* died, leaving three children and no more by the ſaid *Frances*, his wife, namely, *Francis* their only ſon, and *Mary Shute Adams*, and *Catherine Adams*.

4th *July* 1767.—By indenture of three parts between the ſaid *Frances Adams*, the widow of the ſaid *Shute Adams*, of the firſt part, *Joſeph Bliſſet* of the ſecond part, and the ſaid *Francis Adams*, *Mary Shute Adams*, and *Catherine Adams* of the third part, and duly executed by the ſaid *Frances* in the preſence of and atteſted by two witneſſes; reciting the deed of the third of *November*, 1758; and the indenture dated 20th *October*, 1764, and alſo, that by the ſaid deed-poll dated 29th *November*, 1758, the premiſes there ſtood limited *&c.*; and that *Shute Adams* was dead, and that no other appointment had been executed: The ſaid *Frances Adams*, in purſuance of the power to her reſerved by the ſaid ſeveral recited indentures and deed-poll, and of all other powers, did grant, limit, direct and appoint the ſaid two ſeveral moieties, or half parts of the ſaid eſtates at *Clifton*, and *Weſtbury upon Trym*, to the *uſe* of the ſaid *Mary Shute Adams* and *Catherine Adams*, the daughters, for 500 years, to commence from the death of the ſaid *Francis Adams*, ſubject to the proviſo after mentioned; remainder to the uſe of her ſon the ſaid *Francis Adams*, his heirs and aſſigns for ever. *Proviſo*, if the ſon ſhould pay the daughters 3000*l.* each, or 6000*l.* to the ſurvivor, the ſaid term to ceaſe. With the following power reſerved to the ſaid *Frances Adams* to revoke that appointment. *Provided* laſtly, and the ſaid *Frances Adams* doth hereby reſerve to herſelf

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herſelf full power and authority to revoke theſe preſents, and to limit all and ſingular the premiſes to, or between, the ſaid children, or any or either of them, in ſuch manner and for ſuch eſtate or eſtates as ſhe ſhall think fit.

25th *October*, 1771.—By indenture of three parts between ſaid *Frances Adams*, widow, of the firſt part, *John Freeman*, junior, and the Reverend *George Wilkins*, of the ſecond part, and *Mary Shute Adams*, and *Catharine Adams*, of the third part, and executed by the ſaid *Frances Adams*, in the preſence of and atteſted by two witneſſes:—Reciting the deeds of the 3d *November*, 1758, 20th *October*, 1764, deed-poll of 29th of *November*, 1758, and the indenture of 4th *July*, 1767, and the proviſo in the laſt deed to revoke, ſhe, the ſaid *Frances Adams*, in purſuance of the power reſerved to her by the ſaid recited indenture and deed-poll, and all other authorities, did grant and appoint the premiſes ſubject to her own eſtate for life, and the proviſo after mentioned, as to *one moiety*, to the uſe of the ſaid *Mary Shute Adams*, her eldeſt daughter for life; remainder to the truſtees and their heirs to preſerve remainders; remainder to the firſt and other ſons of the ſaid *Mary Shute Adams*, in tail male; remainder to the daughters of the ſaid *Mary Shute Adams*, in tail general, as tenants in common with croſs remainders; remainder to the ſaid *Catherine Adams*, the youngeſt daughter for her life; remainder to the truſtees to preſerve remainders; remainder to her ſons and daughters in the ſame manner; remainder to the uſe of the right heirs of the ſaid *Frances* for ever. And *as to the other moiety*, to the *uſe* of the ſaid *Catherine Adams* for life. Remainder to truſtees to preſerve remainders; remainder to her *firſt* and other ſons in tail; remainder to her daughters in tail general, as tenants in common with croſs remainders, with remainder to the ſaid *Mary Shute Adams*, the eldeſt daughter for life, and afterwards, to her ſons and daughters in manner aforeſaid, with a laſt remainder to the right heirs of the ſaid *Francis Adams*, in the ſame manner as the firſt limited moiety. In this deed alſo, *power was reſerved* to Mrs. *Adams*, the mother, to *revoke* and appoint anew; but ſhe never executed ſuch power.

In *January*, 1775, Mrs *Adams* died inteſtate, leaving her ſaid three children ſurviving her. The ſon and one of the daughters have already attained the age of 21 years; and the youngeſt daughter is of age within a few months.—The queſtion was, Whether the plaintiff *Francis Adams* took any, and what eſtate in the premiſes in queſtion under the ſeveral deeds and inſtruments, and deeds of appointment, or any of them?

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Mr. *Mansfield*, for the plaintiff, made *three* points, and insisted, 1st, That no power of revocation being reserved in the deed of the 20th of *October*, 1764, enabling the survivor of the husband and wife to make an appointment of the estate in question, the widow, by the deed of appointment 4th *July* 1767, had fully executed her power; consequently, the subsequent deed of the 25th *October*, 1771, was entirely null and void *in toto*: And the plaintiff, under the prior deed of the 4th *July*, 1767, was entitled to a fee in the premises in question, subject to the term therein mentioned. 2dly, Supposing *Frances Adams* the survivor could from time to time revoke any former appointment; under the words of the power, she clearly could appoint to *children only*, and not to *grand-children*; *Alexander* v. *Alexander*, 2 *Vezey*, 640. (This was admitted on the other side) therefore, the deed of the 25th of *October*, 1771, was void *pro tanto*. If so the question was, what estate *Francis Adams* the son would then take? and he contended, 3dly, That he took an estate tail in the whole premises, subject to the estates for life to his two sisters; for that the deed of the 29th *November*, 1758, was revoked by the articles of agreement of 24th *September*, 1764, and that by those articles and by the deed of the 20th *October*, 1764, the first deed of the 3d of *November*, 1758, was revived and set up.

Serjeant *Heath*, *contra*, for the defendants contended, 1st, That the deed of the 24th of *September*, 1764, did not revoke the deed of appointment of the 29th *November*, 1758. That it was merely a deed of partition in pursuance of an express power of partition reserved in the deed of 29th of *November*, 1758, and therefore, could neither in legal operation, nor consistently with the intention of the parties, be construed to destroy it. 2dly, That there being *no power* of *revocation* reserved in the *original deed* of the 3d of *November*, 1758, creating the power of appointment, and that power having been once executed by the deed of the 29th *November*, 1758, it was at an end. And therefore, even if it had been the intention of the parties to revoke the uses of that deed, they had no power to do so. *Heli* v. *Bond*. 1 *Eq. Cas. Abr.* 342. Consequently, the plaintiff, by default of any joint appointment having been made, could at most be entitled only to an estate tail *jointly* with his sisters, as tenants in common with cross remainders, as directed in such case by the deed of 29th of *November*, 1758.—Afterwards, on *Saturday November* 22d, in this term, the court certified their opinion to the court of *Chancery* in these words: "Having heard counsel on both sides and considered

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"ſidered this caſe, we are of opinion that the deed of the 29th "of *November*, 1758, is revoked by the ſubſequent inſtruments "of the 24th of *September*, and the 20th of *October*, 1764. And "we think, that the appointment made by *Frances Adams*, the "widow, who ſurvived her huſband, dated the 4th *July*, 1767, is "revoked by the deed of 25th *October*, 1771. And as to the laſt-"mentioned deed, though we are of opinion, that ſhe has thereby "*exceeded* her power, which was confined to *child* or *children*, by "limiting eſtates to her *grand-children*, yet we think, that the "ſame ought to prevail ſo far as her power extended; and that "the limitation to her daughters for life is good: But, that the diſ-"poſition of the inheritance to their child or children is void. "Therefore we are of opinion, that as there is no appointment of "the inheritance of the premiſes, that the ſon *Francis Adams* "took an eſtate tail therein, ſubject to the eſtates for life to his "ſiſters, with remainders over, under the deeds of the 24th *Sep-*"*tember*, and the 20th *October*, 1764, and which limitations "ſeem agreeable to the intention of the parties when they exe-"cuted the firſt deed of the 3d of *November*, 1758."

Friday, Nov. 14th.

DENN *ex dim.* GASKIN *verſus* GASKIN.

Willes Juſtice abſent.

THIS was an action of treſpaſs and ejectment for lands and tenements in *Dalſton*, in the county of *Cumberland*, to which the defendant pleaded the general iſſue; and at the trial it appeared in evidence as follows:

One deviſes thus: "*As* "*to all ſuch* "*worldly* "*eſtate as* "*GOD has* "*endued me* "*with*," I give and bequeath as follows.—I give and deviſe, *All that my freehold meſſuage and tenement lying in G.* together with all houſes, &c. and appurtenances whatſoever belonging to the ſame to *M. R. G. R.* and *T. R. equally*: And then bequeaths, amongſt other pecuniary legacies, *ten ſhillings* to his *heir at law*.—The deviſees are *tenants in common*, and take an eſtate for *life* only.

That *Jonathan Gaſkin*, being ſeiſed in fee of the premiſes in queſtion, by his will bearing date the 30th of *March*, 1736, gave and deviſed in manner following: "*As to all ſuch worldly* "*eſtate as GOD has endued me with*, I give and bequeath as fol-"lows: I give, bequeath and deviſe, *all that my freehold meſſuage* "*and tenement*, lying in *Gaitſgill*, in the pariſh of *Dalſton*, to-"gether with all houſes, barns, orchards, edifices and appurte-"nances whatſoever, reputed as part thereof or belonging to the "ſame, unto *Matthew Robinſon*, *George Robinſon*, and *Thomas* "*Robinſon*, *equally* to them my ſiſter's ſons." The teſtator then, after bequeathing ſeveral ſmall pecuniary legacies to moſt of his relations, gave to *John Gaſkin* (the leſſor of the plaintiff and his *heir at law*) *ten ſhillings*; all the reſt of his goods, chattels, and perſonal eſtate whatſoever, he gave to *Matthew*, *George*, and *Tho-*

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mas Robinſon before mentioned, and revoked all former wills.— That the ſaid *Jonathan Gaſkin*, the teſtator, died ſeiſed of the premiſes in queſtion, leaving the leſſor of the plaintiff his heir at law, who was then, and ever ſince hath been, reſident in *Ireland*. That *George Robinſon* died in 1749, and *Matthew* died in 1762; and that *Thomas*, the other deviſee, is ſtill living. Whereupon a verdict was given for the plaintiff, ſubject to the opinion of the court upon the following queſtion; Whether the leſſor of the plaintiff was entitled to recover any, and what part of the premiſes comprized in the declaration?

Mr. *Bolton* for the leſſor of the plaintiff, argued, 1. That by the deviſe to the teſtator's *three* nephews, *Matthew*, *George*, and *Thomas*, they took only an eſtate for *life*, in the premiſes in queſtion. 2. That they took as *tenants in common* only, and not as jointenants; and conſequently, by the death of *Matthew* and *George*, the leſſor of the plaintiff was entitled to *two thirds* of the whole eſtate.—As to the 1ſt point, he ſaid, it never yet was contended that the deviſe of a "meſſuage or tenement" without any words of limitation added, or words deſcriptive of the quantity of intereſt the teſtator poſſeſſed, as "all my eſtate "and intereſt therein," or the like, could convey more than an eſtate for life. But if that were doubtful, the ſubſequent words "lying in *Gaitſgill*" make this caſe clear; for they are manifeſtly a deſcription of the locality only, not of the quantity of eſtate intended to be deviſed. The only circumſtance from whence it is poſſible in this caſe to infer an *enlargement* of the eſtate to the deviſees, is the legacy of *ten ſhillings* to the heir at law. But that alone is not ſufficient to diſinherit him.—The next queſtion is, Whether the deviſees took as tenants in common, or as jointenants? As to that, the words are, "*equally* to "them my ſiſter's ſons." The words, "equally to be divided" have always been held a tenancy in common. 1 *P. Wms.* 14. And "equally" means the ſame thing. *Cro. El.* 695. 2 *Rol. Abr.* 89. 1 *Eq. Caſ. Abr.* 292. *pl.* 10. 2 *Vez.* 252. Therefore, he prayed judgment for the plaintiff, for two thirds of the deviſed premiſes.—He added, that a third queſtion might poſſibly be made, whether the leſſor of the plaintiff was not barred by the ſtatute of limitations; if it ſhould, a deciſive anſwer would be, that ever ſince his title accrued, the leſſor of the plaintiff had been reſident in *Ireland*: therefore the ſtatute could not run: and cited 1 *Show.* 91. as in point to this purpoſe.

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Mr. *Wood contra*, for the defendant, said, the only point he should consider was, Whether the deviſees took an eſtate in fee, or for life only; and he contended that, upon the whole of the will taken together, it was clear the teſtator meant they ſhould take a *fee*. *Firſt*, the introduction prefatory to the deviſe in queſtion was very material: "*as to all ſuch worldly eſtate as* "*GOD has endued me with, I give, &c.*" Theſe words manifeſtly ſhew the teſtator meant to diſpoſe of *all* the eſtate he had; and therefore, though the ſubſequent words "*lying in* "*Gaitſgill*" might, without ſuch prefatory matter, be conſidered as deſcriptive of the *locality* of the eſtate only; it muſt, when connected with it, (as in this caſe) be conſtrued to convey all the intereſt the teſtator had in the premiſes ſo deſcribed. In addition to this, the teſtator has given a legacy of only 10*s.* to his heir at law; which is demonſtration he meant to diſinherit him, as much as if he had ſaid ſo in expreſs words. All theſe circumſtances prove, beyond a doubt, that the intention of the teſtator was to give a fee-ſimple to his nephews, in the premiſes in queſtion; and if an argument were wanting, the court would ſupply it from the inconſiderableneſs of the value, as they did in the caſe of *Oates, ex dim. Wigfall* v. *Brydon*, 3 *Bur.* 1,895.

Lord MANSFIELD.—The ground the court went upon in that caſe was, that from the nature of the eſtate, and the words uſed by the teſtatrix, they amounted in fact to a *direction to ſell* the eſtate, and divide the produce of it. It was a deviſe of a houſe and ſtable, with the appurtenances, valued *only* at 100 *l.* to *ſeven* children; and the direction was, that the ſaid houſe and ſtable ſhould be "*divided* amongſt them." It is ſettled in deviſes, as well as in deeds, that if no words of limitation are added, the deviſee can only take an eſtate for life: Becauſe the law implies a life-eſtate only, where there are no words of limitation. But as there are no *technical* words neceſſary in a will, if the teſtator makes uſe of what is *tantamount*; as if he ſays, "I give to ſuch "a one *in fee-ſimple*," or "*all my eſtate*," that will carry *all* his *intereſt* in the land deviſed. But there muſt be words in the will to control the rule of law; which I believe, in a variety of caſes, thwarts the intention of the teſtator. I ſuſpect extremely, that in this very caſe the teſtator meant to give his nephews a fee in the premiſes in queſtion; for he had no other landed property. He makes them reſiduary legatees of his perſonalty, and gives a diſinheriting legacy to his heir at law; agreeable to the vulgar notion taken from the *Roman* law, that an heir is cut off with

a ſhilling. Becauſe, by the *Roman* law, a will that paſſed by the heir, was called *inofficioſum teſtamentum*. But the ſingle queſtion is, whether we can find any words in the will to take this caſe out of the rule of law; if we cannot it muſt be adhered to. I think it is impoſſible to find words in this will ſufficient to control the rule of law. If the teſtator had any way connected the introductory part, "*as to all my worldly eſtate*," with the deviſe in queſtion, it might have done. But the introduction is only this, "*as to all ſuch worldly eſtate as GOD* "*has endued me with*, I give to *A. B. &c.* ſo and ſo." Suppoſe he had only given half his property by this will, the introduction would ſtill have been proper: So, if he had given the whole of his landed eſtate only, without diſpoſing of the reſidue of his perſonalty, it would have been equally proper: He does not ſay in the introduction, that he *means* to diſpoſe of *all* his worldly eſtate, but that "*with reſpect to it*," he deviſes ſo and ſo. If he did mean it, the misfortune is, that *quod voluit, non dixit*. Great uſe has been made of this ſort of introduction in wills in favour of the *clear intention* of the teſtator; and more, in favour of creditors, to make a real eſtate liable to the debts of a teſtator. If it were poſſible to borrow aid from it, in this caſe, as I ſtrongly incline in favour of the deviſees, I would do it here: but there are no words that can *connect* the *deviſe* of the lands in queſtion with the *introduction* in this caſe ſo as to paſs the whole intereſt. Therefore the deviſees can only take an *eſtate for life*.

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As to the next queſtion, Whether this is a tenancy in common or a joint-tenancy? there is no room for argument. "*Equally*" as well as "*equally* to be divided," implies a diviſion; whereas if they were to take as joint-tenants, there would be no diviſion. I remember arguing a caſe before Lord *Hardwicke* in ſupport of the opinion of Mr. Juſtice *Gould*, in 1 *P. Wms.* 14. and againſt the opinion of Lord *Holt*; and there, Lord *Hardwicke* thought with Mr. Juſtice *Gould*. It is certainly the better opinion, more liberal, and better founded in law.

ASTON Juſtice.—As to the latter queſtion, the words "equally "to be divided" have been determined to be a *tenancy in common* in a *deed*. With reſpect to the firſt point, I really think, from the circumſtance of the teſtator giving 10*s.* to his heir at law, he meant to diſinherit him. But that *alone* is not ſufficient, and ſo it was held in the caſe of *Wright* on the demiſe of *Shaw* verſus

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Ruſſel in Scacc. *Hil.* 1761. and therefore the rule of law muſt prevail.

Lord *Mansfield* added, that though the intention is ever ſo apparent, the heir at law muſt of courſe inherit, unleſs the eſtate is given to ſomebody elſe.

ASHHURST Juſtice.—I am of the ſame opinion.

Poſtea to be delivered to the leſſor of the plaintiff, and judgment to be entered up for two third parts of the premiſes in queſtion.

Afterwards, on *Saturday*, *November* 15th in this term, Mr. Juſtice *Aſton* ſtated the caſe of *Wright ex dim. Shaw* verſus *Ruſſel*, to have been as follows:—The words of the introduction to the will were "*as touching the diſpoſition of all ſuch worldly eſtate as it hath pleaſed GOD to beſtow upon me, I give, &c.*" Then the teſtator gave a houſe to his grandſon *Henry*, and after his deceaſe to *his* two ſons *Thomas* and *William*; and then deviſed to *Thomas Ebb*, the huſband of the heir at law, *one ſhilling*. The queſtion was, Whether *Thomas* and *William* took an eſtate for *life*, or in *fee*; and the court held they took only an eſtate *for life*.

Same day.

BLAKEY *verſus* DINSDALE *et al.*

Diſtreſs cannot be made for the toll of goods *fraudulently* ſold *out* of the market, to avoid the toll. But the party injured muſt bring a *ſpecial action on the caſe.*

THIS was an action of treſpaſs for ſeizing and taking away the plaintiff's wheat. The defendants pleaded, 1ſt, The general iſſue. 2*dly*, That the borough of *Ripon* was an ancient borough; and that within the ſaid borough, from the time whereof the memory of man is not to the contrary, there has been an ancient market, held every *Thurſday*, for buying of corn and grain; and that the corporation were entitled to receive for toll, one half pint out of every buſhel of corn brought to the market for ſale: And then juſtified the taking as ſervants of the corporation. 3*d*, Plea, preſcribing for toll of all corn brought into the borough of *Ripon*, for ſale on a market-day. 4*th*, Plea, preſcribing for toll of all *corn brought into* the borough of *Ripon for ſale*, in conſideration of cleanſing and ſweeping a large ſtreet in the borough, for the receiving and ſtanding of all corn brought within the ſaid borough for ſale. Replication, *de injuriâ ſuâ propriâ abſque tali cauſâ*. The cauſe was tried at the *Summer* Aſſizes 1771, for the county of *York*, before Mr. Juſtice *Gould*, when it appeared in evidence as follows:—That *Thomas Cowper* took a *Chamber* for a year *to keep corn in, within the borough of Ripon*; and on *Thurſday*, being a *market day*, he called

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on the plaintiff *Blakey at his own houſe within the borough of Ripon*, which is two hundred yards and upwards from the place called the *Market-place*. They went together to the ſaid *Chamber*, and *Cowper* ſhewed him a ſample of wheat *which he took from ſixty buſhels* of wheat which he had *in his chamber*, and ſold him four quarters of wheat, being thirty-two buſhels of wheat, *which he had at his houſe*, which is *ten miles out of the borough of Ripon*, at five ſhillings and four-pence *per* buſhel; to be delivered at any time within a month, as it ſuited the conveniency of him the ſaid *Cowper*; and *Blakey* gave *Cowper* a halfpenny to bind the bargain. Afterwards, within the month, it ſuiting *Cowper*'s conveniency, being on a *Thurſday*, the market-day, he ſent it by his ſervant *Hood*, to be delivered at the plaintiff's mill. As he was going through the borough of *Ripon*, by *Todd*'s houſe, through the place called the *Market-place*, being a common ſtreet there, the defendant *Todd* aſked *Hood*, "where "he was carrying the corn;" who ſaid "to *Blakey*'s mill."—*Todd* followed the cart into *Blakey*'s fold yard adjoining to the mill, and then *demanded* toll for the corn, which *Blakey* refuſed: *Todd* went away; he returned with the defendant, *Dinſdale*, who was an officer of the mayor, and a toll-gatherer, when *part of the corn had been unloaded*. The defendants *then* got upon the cart, and took the thirty-two half-pints, as for toll for the thirty-two buſhels, from the corn remaining in the cart. As ſoon as they had taken the corn, *Blakey* reſiſted them, and endeavoured to take it from them. The remainder of the corn was left with *Blakey*, and he afterwards paid *Cowper* for the whole. Whereupon a verdict was given for the plaintiff, ſubject to the opinion of the court upon the following queſtion; Whether the plaintiff is entitled to recover upon the general iſſue? And if the court is of that opinion, then, Whether the facts proved, maintain any, and which of the iſſues on the part of the defendants? And the verdict to be entered accordingly.

Mr. *Norton* for the plaintiff. The firſt queſtion is grounded upon an objection taken at the trial, that the plaintiff had not ſufficiently proved his property in the corn in queſtion, ſo as to maintain this action. With reſpect to that, it is found, that he bought by ſample, and paid earneſt: which is clearly ſufficient to veſt the *general* property in him. *Noy's Maxims*, *p.* 94. *Perkins*, *ſect.* 92. And if ſo, it is equally clear, that a perſon in whom the general property of a chattel is, may maintain treſpaſs *vi et armis* for an injury done to it, though he is not

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in *actual* poſſeſſion. *Hodſon* verſus *Hodſon*, *Latch*, 263. *Fiſher* verſus *Young*, 2 *Bulſtr.* 268. But in this caſe, it was actually carried into the plaintiff's yard, and part unloaded: Therefore there was an actual delivery.——As to the *ſecond* point; Whether the facts found were ſufficient to ſupport any of the juſtifications ſet up; he contended, that there could be no pretence for ſaying this corn was *brought* to the *market*, or *within* the borough, for the purpoſe of *ſale* there; without which, unqueſtionably the defendants could have no right to toll. He ſuppoſed the objection would be, that the tranſaction was a fraud upon the corporation, with a view to elude the toll: But if it were, fraud is a fact, and muſt be found: The court will not preſume it. 11 *Co.* 56, 57. *Cro. Car.* 553. Therefore he prayed judgment for the plaintiff.

Mr. *Chambre contra*, for the defendants, upon the firſt queſtion contended, that the plaintiff in this caſe had not ſuch a property in the corn in queſtion, as to entitle him to recover in an action of treſpaſs *vi et armis*. He argued that a poſſeſſion in *law* is not ſufficient: it muſt be a poſſeſſion in *fact*. This appears from the doctrine laid down in *Fitzherbert N. B.* 91. *B.* He ſays, "if the lord of a manor is entitled to waif or ſtray "within his manor, and another man taketh the waif or "ſtray out of the manor, the lord ſhall have an action of treſ-"paſs for them, and that without any ſeiſure of them be-"fore." This caſe is put by *Fitzherbert* by way of exception to the general rule; and *exceptio probat regulam.* As to the authorities from *Latch* 263. and 2 *Bulſtrode* 268, the plaintiffs, in both thoſe caſes, were *executors*; and no doubt an executor may maintain treſpaſs, though not in poſſeſſion at the time of the injury; for this reaſon; if *he* were not conſidered as in poſſeſſion, no one could be; and therefore the law *throws* the poſſeſſion upon him. But this is the common caſe of a ſale without delivery, and a treſpaſs committed in the mean while; in which caſe, the ſeller is in actual poſſeſſion: and therefore, alone entitled to bring the action.—As to the ſecond queſtion, he contended that the ſecond juſtification, *viz.* that this was corn brought into the borough for ſale, was ſufficiently proved; for that ſubſtantially the corn in queſtion was brought within the borough for that purpoſe. It was brought by ſample, which is a bringing to market, and was ſold to the plaintiff in the borough on a market-day. It was afterwards, on a ſubſequent market-day, *delivered* to him; and then the contract was complete.

plete. The ſale therefore was entirely in the market: And though no fraud is found, it is impoſſible not to ſee, that the ſole object of the parties in this mode of ſale was to elude the toll. It is alſo impoſſible not to ſee, that if this ſpecies of contrivance is to prevail, the market muſt decay for want of profits. He prayed judgment therefore for the defendants, on the third plea.

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BLAKEY *verſus* DINSDALE.

Lord MANSFIELD.—There is no difficulty in this caſe. The firſt queſtion is, as to the poſſeſſion of the plaintiff; Whether it was ſuch as to entitle him to recover in this action. No doubt but this corn was the plaintiff's property. He might have brought an action for it againſt the vendor; for the bargain was completely bound by the earneſt. Part of the contract was, that it ſhould be delivered within a month; and the ſeller, before the expiration of the month, delivers it to his ſervant to carry to the plaintiff's mill. The moment he had done ſo, it was to all honeſt purpoſes, in reſpect of third perſons, delivered to the plaintiff. But what is ſtill ſtronger in this caſe is, that it was abſolutely brought to the plaintiff's houſe, and part of it unloaded, before the treſpaſs complained of was committed. That is an *actual*, not a conſtructive poſſeſſion.—The next queſtion is, Whether this corn was, *on the day of the treſpaſs complained of*, brought within the borough of *Ripon*, to be ſold in the market? The caſe ſtates directly the contrary; for it ſtates that the contract was made long before; on the *Thurſday* when the ſample was ſhewn; and that it was actually ſold at that time. The day it was ſeized for not paying toll, it was only paſſing through the borough in the road to the plaintiff's mill, which was ten miles off. As to the ſuggeſtion that this is a fraud upon the corporation: There are caſes in which a man cannot defend himſelf even by facts ever ſo ſtrong, in ſupport of a fraud, if the fraud can be got at; but then it muſt be made appear. If this mode of ſale is a fraud upon the toll, the remedy of the corporation is by *ſpecial action on the caſe*. I remember a caſe of that ſort by the city of *London* againſt perſons for bringing corn juſt by the market, in order to avoid the toll; and on a ſpecial action upon the caſe the fraud was found. But this caſe, as ſtated, is a very different thing. Here, the vendor lives in the town: ſhews a ſample of corn to a cuſtomer, who agrees for a certain quantity, to be delivered at his mill ten miles off: and the goods happen on a market day, merely to paſs through the market in the way to the place where they were

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intended to be delivered. If it is really a trick, the defendants muſt bring an action on the caſe.

The three other judges concurred.

Per Cur. Judgment for the plaintiff.

Same day.

DUNDASS *verſus* Lord WEYMOUTH.

The proper mode of declaring in covenant, is to ſet out that by indenture, certain premiſes therein mentioned were demiſed, without ſtating them particularly, ſubject amongſt other things to a *proviſo*, ſetting out the ſubſtance of the covenant, and the breach.

THIS was an action of covenant on a mortgage deed, in which the declaration ſet out all the premiſes, the *habendum*, the proviſo, the covenant for payment of the money, and the breach for non-payment. The premiſes were very numerous, and ſwelled the declaration to a conſiderable length. The cauſe ſtood in the paper for judgment on demurrer to the declaration, and there was no argument. But Lord *Mansfield* took notice of the great length of the declaration, and ſaid, though he was told this was the uſual practice, he thought it a diſgrace to the profeſſion and the court.

A gentleman at the bar who had drawn it ſolemnly averred he took it to be neceſſary. Mr. *Wallace* and others, converſant in ſpecial pleading, ſaid, it was not only unneceſſary, but very dangerous, by being liable to variances and formal objections.

The court were all of opinion, that it is ſufficient for the plaintiff to ſet out in his declaration, that the defendant by indenture had demiſed certain premiſes therein mentioned, without ſtating them particularly, ſubject amongſt other things to ſuch a proviſo, ſetting out the ſubſtance of the covenant and the breach.

Lord *Mansfield* deſired the bar to take a note of this, and waited till ſeveral gentlemen made a memorandum; And gave notice, that the court would animadvert upon any future inſtance of putting parties to the enormous expence of ſetting out deeds at length, or ſuperfluous parts of them. *N. B.* In this caſe, though there was no queſtion, the defendant wanting only a little time, and though the plaintiff had no view to put the defendant to unneceſſary charge, the expence of this unneceſſary declaration amounted to a large ſum.

TYRIE *versus* FLETCHER.

Tuesday, Nov. 18.

THIS was an action on the case, for money had and received to the plaintiff's use; brought by the plaintiff, the *insured* in a policy of insurance, against the defendant, the underwriter, for a return of *part* of the premium.—The cause was tried before Lord *Mansfield* at *Guildhall*, at the sittings after last *Trinity* term, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the court upon the question, Whether, under the circumstances of the case, a proportionable part of the premium ought to be returned, or not? If the court should be of opinion, that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered.—It now came before the court upon a rule to shew cause why a nonsuit should not be entered; and the case, as it appeared from the report, was shortly this. "The policy of insurance was "upon the ship *Isabella*, at and from *London* to any port or "place, where or whatsoever, *for twelve months*, from the 19th "of *August* 1776, to the 19th of *August* 1777, both days inclu-"sive, at 9 *l. per cent.* warranted free from captures and seizures "by the *Americans*, and the consequences thereof." In all other respects it was in the common form, against all perils of the sea, *&c.* The ship sailed from the port of *London*, and was taken by an *American* privateer, about two months afterwards.

Upon a policy "at "and from "such a "a port to "any other "port or "place "whatso-"ever for "12 *months*, "at 9 *l. per* "*cent.* war-"ranted "free from "capture," the risk is *entire*; and therefore, if *once* begun, there shall be no return of premium.

Mr. *Dunning* and Mr. *Davenport*, for the plaintiff, shewed cause, and insisted, that a proportionable part of the premium in this case ought to be returned: That 9 *l.* the compensation estimated for the risk of *twelve* months, was much more than adequate to the risk actually run in this case, *viz.* only *two* months. That from the nature of the insurance, both parties must know the risk was divisible; and of course intend, if it ceased before the twelve months, that the whole of the premium should not be retained. That this was the law in other cases, where, upon a suitable compensation for a given risk, the risk had turned out to be different from what was expected. In *Stevenson* versus *Snow*, 3 *Bur.* 1237. the risk ceased before the end of the voyage insured, and it was there held, there should be a return of premium in proportion to the risk that had not been run. It is true, that was a policy upon a *voyage*; but it is as easy, or easier, to apportion the risk in a policy upon time,

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* *Supra*, 601.

as it is, in a policy upon diſtance. In the caſe of *Bond* verſus *Nutt*, *Trin.* 17 *Geo.* 3. *B. R.* * which was a policy "at and "from *Jamaica* to *London*," the underwriters paid into court a part of the premium, in proportion to that part of the voyage from which they held themſelves diſcharged. This caſe is not like the caſe of an inſurance upon lives, to which it was compared at the trial; becauſe, that is in the nature of a wager: But this is, in the true ſpirit and uſe of an inſurance, an indemnity againſt a loſs. That loſs, according to the terms of the policy, might accrue later, or earlier, or not at all; but in the caſe that has happened, namely, a capture by an *American* privateer, the riſk of any ſuch loſs as that inſured againſt muſt totally ceaſe. The conſtruction therefore of the policy, under theſe circumſtances, ought to be, that it was an inſurance for *twelve* months at the *rate* of *ſo much per month*; and as the riſk in fact, was only run for two months, the premium advanced upon the other ten, ought to be returned.

Mr. *Wallace* and Mr. *Baldwin contra*, for the defendant, and in ſupport of the rule, contended, that as ſoon as the ſhip ſailed from the port of *London*, the policy attached for the whole time inſured againſt. That there was no calculation of the premium, at ſo much *per* month; but it was one entire groſs ſum of 9 *l. per cent.* ſtipulated and paid for twelve months. The contract therefore was *entire*, without any intention or thought of diviſion, or apportionment. That the caſe of *Stevenſon* verſus *Snow* did not at all apply; for there, the court went upon the ground of its being a policy upon *two diſtinct* voyages, ſeparately and diſtinctly in the contemplation of the parties at the time; and the premium calculated accordingly. Of courſe, if either of the voyages were prevented from taking place, the riſk upon it could not attach; and therefore the premium ought to be returned. Upon the principles laid down on the other ſide, every policy for time might be divided. Suppoſe an inſurance for a month, would the plaintiff have been entitled to reſtitution for a number of days? It is abſurd; and there would be no drawing the line. If there had been a recapture the policy would have revived. The fault of the party, is not the true ground upon which a return of premium is or is not allowed; but it reſts upon this: Whether the riſk, or the voyage inſured, has begun? If it has, there can be no return of premium. 2 *Magens* 267. No. 1,071. There are many caſes, where, notwithſtanding the fault of the party, a return of premium is allowed,

lowed. For inſtance, if a ſhip is inſured at and from ſuch a port to ſuch a port, and the party goes on another voyage, the premium muſt be returned: Becauſe the riſk never commenced. So, if he is to ſail with convoy, and ſtays behind.—But with reſpect to the preſent caſe, it is not diſtinguiſhable from an inſurance upon a life for a year, with an exception of ſuicide, where the party deſtroys himſelf within a month. No one ever thought of requiring a return of premium in that caſe, becauſe the *riſk* is *entire*. So here, it is one *entire*, *indiviſible* riſk; which being once begun, there can be no return of premium. And conſequently, the plaintiff is not entitled to recover.

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Lord MANSFIELD.—It was very proper to ſave this caſe for the opinion of the court, becauſe in all mercantile tranſactions, certainty is of much more conſequence, than which way the point is decided; and more eſpecially ſo, in the caſe of policies of inſurance; becauſe, if the parties do not chuſe to contract according to the eſtabliſhed rule, they are at liberty as between themſelves to vary it. This caſe is ſtript of every authority. There is no caſe or practice in point; and, therefore, we muſt argue from the general principles applicable to all policies of inſurance. And I take it, there are two general rules eſtabliſhed, applicable to this queſtion: The firſt is, That where the riſk has not been run, whether its not having been run was owing to the fault, pleaſure, or will of the inſured, or to any other cauſe, the premium ſhall be returned: Becauſe a policy of inſurance is a contract of indemnity. The under-writer receives a premium for running the riſk of indemnifying the inſured, and whatever cauſe it be owing to, if he does not run the riſk, the conſideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. 2. Another rule is, that if that riſk of the contract of indemnity has *once* commenced, there ſhall be no apportionment or return of premium afterwards. For though the premium is eſtimated, and the riſk depends upon the nature and length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or leſs, the riſk is run; the contract is for the whole entire riſk, and no part of the conſideration ſhall be returned: and yet, it is as eaſy to apportion for the length of the voyage, as it is for the time. If a ſhip had been inſured to the *Eaſt Indies* agreeably to the terms of the policy in this caſe, and had been taken twenty-four hours after the riſk was begun, by an *American* captor, there is not a colour to ſay, that there ſhould have been

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been a return of premium. So much then, is clear; and indeed, perfectly agreeable to the ground of determination, in the case of *Stevenson* versus *Snow*. For in that case, the intention of the parties, the nature of the contract, and the consequences of it, spoke manifestly *two* insurances, and a *division* between them. The first object of the insurance was from *London* to *Halifax*: But if the ship did not depart from *Portsmouth*, with convoy (particularly naming the ship appointed to be convoy,) then, there was to be no contract from *Portsmouth* to *Halifax*: why then, the parties have said, "we make a contract from *London* to "*Halifax*, but on a certain contingency it shall only be a con-"tract from *London* to *Portsmouth*." That contingency not happening, reduced it in fact to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction. Mr. *Yates*, who was for the plaintiff, put it strongly upon that head; and all the judges, in delivering their opinion, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages: and it was the equitable way of considering it; for, though it was at first consolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Justice *Wilmot* put it particularly upon that ground, but it was the opinion of the whole court. There was a usage also found by the jury in that case, that it was customary to return a proportionable part of the premium in such like cases, but they could not say *what* part. The court rejected this as a usage for the uncertainty; but they argue from it, that there being such a custom, plainly shewed the general sense of merchants, as to the propriety of returning a part of the premium in such cases: And there can be no doubt of the reasonableness of the thing.—There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and apposite to the present case; and that is, an insurance upon a man's life for twelve months. There can be no doubt but the risk there, is constituted by the measure of time, and depends entirely upon it: For the underwriter would demand double the premium for *two* years, that he would take to insure the same life for *one* year only: In such policies there is a general exception against suicide.—If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast that part of the premium should be returned.—A case of general practice was put by Mr. *Dunning*, where the words of

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the policy are, "At and from, provided the ſhip ſhall ſail on or "before the 1ſt of *Auguſt*:" And Mr. *Wallace* conſiders in that caſe, that the whole policy would depend upon the ſhip ſailing before the ſtated day. I do not think ſo, on the contrary, I think with Mr. *Dunning*, that cannot be. A loſs in port *before* the day appointed for the ſhip's departure, can never be coupled with a contingency after the day: but if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of the determination in *Stevenſon* verſus *Snow*; and that there were *two* parts or contracts of inſurance, with diſtinct conditions. The firſt is, I inſure the ſhip in port, provided ſhe is loſt in port before the 1ſt of *Auguſt*: And 2*dly*, if ſhe is not loſt in port, I inſure her then during her voyage from the 1ſt of *Auguſt*, till ſhe reaches the port ſpecified in the policy. The loſs in port muſt happen, before the riſk upon the voyage could commence: And *vice verſâ*, the riſk in port muſt ceaſe, the moment the riſk upon the voyage began.—Let us ſee then what the agreement of the parties is in the preſent caſe. They might have inſured from two months to two months; or in any leſs or greater proportion, if they had thought proper ſo to do; but the fact is, that they have made *no diviſion of time at all*; but the contract entered into is one entire contract from the 19th *Auguſt* 1776, to the 19th *Auguſt* 1777; which is the ſame as if it had been expreſsly ſaid by the *inſured*, "If you the underwriter will inſure me for "twelve months, I will give you an *entire* ſum; but I will not "have any apportionment."—The ſhip ſails, and the underwriter runs the riſk for *two* months. No part of the premium then ſhall be returned,—I cannot ſay, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.

ASTON Juſtice.—This caſe depends upon the words of the policy: and I am of opinion, it is one entire contract at a certain groſs ſum of 9 *l. per cent.* for a certain period of time, *viz.* twelve months; and that no diviſion is to be implied. The determination in *Stevenſon* verſus *Snow*, went expreſsly upon this conſideration; that there were *two diſtinct* voyages; and no conſideration received by the *inſured* for the premium upon the ſecond voyage; And there certainly was not; for there never was any point of time, when any riſk was run from *Portſmouth*. In *Bond* verſus *Nutt*, the loſſes inſured againſt were diſtinct, and unconnected with each other. 1*ſt*, A loſs of the ſhip in port, if

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any ſhould happen there. 2*dly*. A loſs in her paſſage home, provided ſhe ſailed on a certain day. The riſk in ſome policies may be diſtinct and diviſible in its nature. In the caſe of an inſurance upon a life, the ſum is *lumped*, and the time is *lumped* for the year. So in this caſe I think the contract is one entire contract; and, therefore, that there ought to be no return of premium.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

Per Cur. Let a nonſuit be entered.

CARLISLE *qui tam verſus* TREARS.

If plaintiff declare upon a corrupt contract on the 21ſt *December*, 1774, giving day of payment to the 23d *December*, 1776; evidence of a contract on the 23d *December*, 1774, for *two* years, is a fatal variance.

UPON ſhewing cauſe why the verdict found for the plaintiff in this caſe, upon the *eleventh* count, ſhould not be vacated, and inſtead thereof, a verdict entered for the defendant, Lord *Mansfield* reported the caſe ſhortly as follows: This was an action upon the ſtatute of uſury, 12 *Ann. ſtat.* 2. *c.* 16. The declaration conſiſted of a variety of counts, and upon not guilty pleaded, the jury found a verdict for the plaintiff. The ſingle queſtion ariſes upon the laſt count, which ſtated, that upon a corrupt contract made on the 21ſt *December*, 1774, the defendant received 6 *l.* 8 *s.* upon the loan of for giving day of payment to the 23d *December*, 1776. The only witneſs who was called, proved the contract to have been made on the 23d *December*, 1774, and he ſaid, he underſtood it to be for *two* years. I thought this a variance, but reſerved it for the opinion of the court.

Mr. *Waliace* for the defendant, and in ſupport of the rule, inſiſted, that the time of forbearance was as neceſſary to be preciſely ſtated as the ſum.

Mr. *Davenport contra*, for the plaintiff argued, that ſuppoſing the contract was made on the 23d *December*, and the forbearance to be for *two* years, it was equally uſurious, and therefore, the variance was immaterial.—But, by Lord *Mansfield*, there is no colour for the plaintiff's recovering upon this count. The uſurious contract muſt be proved as laid: whereas, the contract, proved in this caſe, is totally different from the contract ſtated in the declaration.

Per Cur. Rule abſolute.

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REX *verſus* RODDAM.

THIS was a rule upon the defendant to ſhew cauſe, why he had not obeyed a writ of *habeas corpus*, requiring him to bring up the bodies of two perſons *ad teſtificandum*. The writ was directed to the defendant as commanding officer of a man of war, on board of which, the two perſons intended to be brought up, were in the capacity of common ſailors, but *not* as *priſoners*.

Mr. *Buller*, who ſhewed cauſe, ſaid, a deciſive anſwer to the application was, that the writ was not ſigned by a judge.

Lord MANSFIELD.—I refuſed to ſign the writ, becauſe there was no affidavit that the men had been ſerved with *ſubpœnas*, and that they were willing to attend: And without ſuch an affidavit, the writ ought not to go: They can never be brought up as priſoners againſt their conſent. Therefore diſcharge the rule with coſts.

REX *verſus* HORNE.

Wedneſday, Nov. 19th.

THIS was an information filed againſt the defendant, by *Edward Thurlow*, Eſq. his Majeſty's Attorney General, on behalf of his Majeſty, for writing, printing, and publiſhing two libels.

Upon an information againſt the defendant for a libel, for that &c. &c. wickedly, maliciouſly and ſeditiouſly did write and publiſh, &c. a certain falſe, ſcandalous, and ſeditious libel "OF AND "CONCERNING *his* "*Majeſty's* "*government* "*and the employment* "*of his troops*" according to the tenor and effect following; (ſetting forth the libel *verbatim.*)—The words "*of and concerning*" are a *ſufficient introduction* of the *matter* contained in the libel, and a ſufficient *averment* that it was written "*of and concerning the King's government, and the employment of his troops.*"

The firſt count in the information ſtated, "That the ſaid "*John Horne*, being a wicked, malicious, ſeditious, and ill-diſ- "poſed perſon, and being greatly diſaffected to our ſaid preſent "Sovereign Lord the King, and to his adminiſtration of the go- "vernment of this kingdom, and the dominions thereunto be- "longing, and wickedly, maliciouſly, and ſeditiouſly intending, "deviſing, and contriving to ſtir up and excite diſcontents and "ſeditions among his Majeſty's ſubjects, and to alienate and "withdraw the affection, fidelity, and allegiance of his ſaid Ma- "jeſty's ſubjects from his ſaid Majeſty, and to inſinuate and cauſe "it to be believed, that divers of his Majeſty's innocent and de- "ſerving ſubjects had been inhumanly murdered by his ſaid Ma- "jeſty's troops in the province, colony, or plantation of the *Maſ-* "*ſachuſet's Bay*, in *New England*, in *America*, belonging to the

"crown

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"crown of *Great Britain*, and unlawfully and wickedly to seduce "and encourage his said Majesty's subjects in the said province, co- "lony or plantation, to resist and oppose his Majesty's government, "on the 8th day of *June*, in the 15th year of the reign, &c. "with force and arms at *London* aforesaid, in the parish of St. "*Mary le Bow*, in the ward of *Cheap*, wickedly, maliciously, and "seditiously, did write and publish, and cause and procure to be "written and published, a certain false, wicked, malicious, scan- "dalous and seditious libel, *of and concerning his said Majesty's "government, and the employment of his troops*, according to the "tenor and effect following:——"*Kings Arms Tavern, Corn- "hill, June* 7, 1775. At a special meeting this day of several "members of the Constitutional Society, during an adjournment, "a gentleman proposed, that a subscription should be immediately "entered into, (by such of the members present who might ap- "prove the purpose,) for raising the sum of 100 *l.* to be applied to "the relief of the widows, orphans, and aged parents of our "beloved *American* fellow subjects, who, faithful to the charac- "ter of *Englishmen*, preferring death to slavery, were, for that rea- "son only, inhumanly murdered by the King's (meaning his said "Majesty's) troops, at or near *Lexington* and *Concord*, in the "province of *Massachuset's*, (meaning the said province, colony, or "plantation of the *Massachuset's Bay*, in *New England*, in *Ame- "rica*,) on the 19th of last *April*; which sum being immediately "collected, it was thereupon resolved, that Mr. *Horne* (meaning "himself the said *John Horne*) do pay to-morrow into the hands of "Messieurs *Brownes* and *Collison*, on the account of Dr. *Franklin*, "the said sum of 100 *l.* and that Dr. *Franklin* be requested to "apply the same to the abovementioned purpose.—*John Horne.*" "(meaning himself the said *John Horne*) in contempt of our said "Lord the King, in open violation of the laws of this kingdom, "to the evil and pernicious example of all others in the like case "offending, and also against the peace of our said present Sove- "reign Lord the King, his crown and dignity."

There were other counts in the information, charging the said *John Horne*, with causing the same libel to be printed in *The London Packet, or New Lloyd's Evening Post*, and *The Morning Chronicle, or London Advertiser*.

The count on the *second* libel was as follows, *viz.* That the said *John Horne* being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously intending, devising, and contriving as aforesaid, afterwards, to wit, on the 14th day of

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July in the 15th year aforeſaid, with force and arms at *London* aforeſaid, in the pariſh and ward aforeſaid, wickedly, maliciouſly, and ſeditiouſly did write and publiſh, and cauſe and procure to be written and publiſhed, a certain falſe, wicked, malicious, ſcandalous, and ſeditious libel, *of and concerning his ſaid Majeſty's government, and the employment of his troops*, according to the tenor and effect following: "I (meaning himſelf the ſaid *John* "*Horne*) think it proper to give the unknown contributor this "notice; that I (again meaning himſelf the ſaid *John Horne*) did "yeſterday pay to Meſſrs. *Brownes* and *Colliſon*, on the account of "Dr. *Franklin*, the ſum of 50 *l.* and that I (again meaning him-"ſelf the ſaid *John Horne*) will write to Dr. *Franklin*, requeſting "him to apply the ſame to the relief of the widows, orphans, and "aged parents of our beloved *American* fellow ſubjects, who, "faithful to the character of *Engliſhmen*, preferring death to ſlavery, "were (for that reaſon only) inhumanly murdered by the King's "(meaning his ſaid Majeſty's) troops, at or near *Lexington* and "*Concord*, in the province of *Maſſachuſet's* (meaning the ſaid "province, colony, or plantation of the *Maſſachuſet's Bay* in *New* "*England* in *America*) on the 19th of *April* laſt. *John Horne.*" "(again meaning himſelf the ſaid *John Horne*) in contempt of "our ſaid Lord the King, in open violation of the laws of this "kingdom, to the evil and pernicious example of all others in "the like caſe offending, and alſo againſt the peace of our ſaid "preſent ſovereign Lord the King, his crown, and dignity."

Other counts were added for cauſing this laſt libel to be printed in the public newſpapers. The defendant pleaded: Not guilty.

The information was tried at the ſittings in *London*, after *Trinity* Term, 1777, before the Earl of *Mansfield*, by a ſpecial jury, and the defendant found guilty of all the offences charged in the information.—This day Mr. *Horne*, *in perſon*, moved the court in *arreſt of judgment*, alleging that the information was inſufficient, in as much as it did not aver that any rebellion had been in the colony of the *Maſſachuſet's Bay*, or that certain perſons, who were denominated the King's troops, had been employed by his Majeſty and his government to quell that rebellion, or that any engagement had happened between the King's troops and the rebels, or that any of the rebels had been ſlain in ſuch engagement by the King's troops, or that the advertiſements, or that the charge of murder therein contained, had any relation

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to such slaughter of the rebels, or to the action of the King's troops.

He argued, that nothing can be intended beyond that which is expressly averred in the record. On the other hand, if by any possible construction or intendment those expressions which are said to be criminal, can receive an *innocent* sense, consistently with what is expressly averred in the record, the consequence is, that no crime is sufficiently alleged. That troops may mean flocks, or companies of strollers, or deserters, and if, in *any supposable* circumstances, the words complained of might have been said *innocently*, there is no crime charged in this record. He cited Mr. Justice *Atkins's* opinion, *State Trials*, *vol.* 3. 760. as to the insufficiency of the indictment against Lord *Russel*, charging him with a design to seize the guards for the preservation of the King, *without* averring, "*who the King's guards were.*"

Lord MANSFIELD.—Whatever the degree of guilt may be, how strongly soever it may have been proved, or whatever observations may have arisen in this case; yet if the defendant is entitled to a legal advantage from a literal flaw, GOD forbid he should not have the benefit of it. It is most certain, that at the trial, the information was considered to be, for words written "*of and concerning the King's government*, and *his* employment "of his troops;" that is, the employment of the troops by government. Upon that ground, the defendant called a witness, (Mr. *Gould*,) whom the Attorney General rose to object to. He was called to prove the contents of an affidavit made by him, and published in the papers. I told the defendant he could not be called to prove the contents; but if he only meant to prove there was such an affidavit published, and by that, to explain the subject matter to which the libel related, it might be read. If it was the employment of the troops, under proper authority, *that* came within the charge in the information. Had it been a lawless fray it would not; and so I believe I said at the trial. It might have been a libel of the individuals; but it would not have been *this* libel; a libel of the *King's troops* employed by *him*. Now at first, and at present, it seems to me, that, "*of and concerning the King's government and the employment of his troops*" pins it down. But I doubt a little whether there may not be some weight in the objection; that is, whether in the form of drawing the information there should not have been *innuendos*. In common reason and understanding it is charged; but whether technically charged or not, I do not know; and there-

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therefore, as to this point, without prejudice, we will take some time to consider of it; to see whether *precedents* can be found, which require a technical scrupulousness, over and above that certainty which is sufficient to every reader; and we will go on with the rest, *de bene esse*, as we could not pronounce judgment upon it now. We will consider of it till the defendant comes up again; and if we find sufficient to satisfy us to overrule the objection, then we will give judgment upon the whole of the case at the same time.—His lordship then reported the evidence as follows:

Thomas Wilson proved the advertisements in question, the manuscripts, to be the hand of *Horne*. *Henry Sampson Woodfall*, who published the advertisements, swore that the defendant gave him a paper on the 7th of *June*, to publish in his own and to send to the other papers; and that the defendant paid the fees: then he produced two advertisements to be published. The defendant cross-examined him, and he assented to the question of the cross-examination, by saying, "By your desire I inserted these "advertisements; and published them as your act and deed: You "never desired to be screened; but you desired to be given up: "You said, they should not want full evidence."—*William Woodfall* proved likewise a paper given *him* by the defendant to be inserted in the *London Packet*, and *Morning Chronicle*, which were the advertisements in the record. Therefore, upon the fact of printing and publishing there is no doubt at all.

The defendant called a witness to prove that really and in truth there was a subscription, and that the money was actually raised; he likewise called *William Lacy*, who proved that 100*l.* was paid to him, and by him remitted to Dr. *Franklin*. Then the defendant called *Thoroton Gould*, who said, that at *Lexington*, on the 19th of *April* 1775, he was a subaltern officer, that he was ordered there by the Adjutant of General *Gage*, the commander in chief of his Majesty's troops, and governor of the province; and he, together with the other troops, set out, and between two and three in the morning he was taken prisoner; that he heard the provincials charge our troops. He said, "we found them armed; we supposed they were marching to at"tack us, from a continual firing of alarm cannon, early in the "morning, as soon as we began to march: notice or alarm guns "are to raise the country." Upon this evidence the jury found the defendant *guilty*.

Lord MANSFIELD then asked the Attorney-General, if he had any thing to say; who answered, he apprehended it belonged to

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the defendant to ſtate what he could to the court in his extenuation.

Mr. *Horne* ſaid, he ſhould ſtate nothing in extenuation, till the court had told him there was a crime. His objection was, that no crime was charged in the information, and, therefore, it was unneceſſary for him to ſay any thing till the court had diſpoſed of that objection.—The matter was accordingly adjourned till *Monday* the 24th inſtant in this term; when Mr. *Horne* appearing again in court, Lord *Mansfield* delivered the opinion of the court, upon the objections taken in arreſt of judgment, to the following effect:

Lord MANSFIELD.—In reading my notes the other day in the caſe of the *King* and *Horne*, I overlooked the reference to a written piece of evidence given by the defendant at the trial; and I am told I did not ſtate it: Therefore I will ſtate it now.

He produced to captain *Gould* the *Public Advertiſer* of the 31ſt of *May* 1775, in which was an advertiſement purporting to be the copy of an affidavit, made by captain *Gould*, while he was a priſoner, in the cuſtody of the rebels, at *Bedford*; and he aſked him, Whether the contents were truly printed? I told the defendant, if he meant to prove the facts to be true as above, it could not be done by affidavit, the perſon himſelf being preſent; and even if he was abſent, they could not be proved by affidavit; but if he meant to ſhew, that at that time there exiſted a public account in the newſpapers, which might be of uſe to reſtrain or qualify the meaning of the paper in queſtion upon the information, he might do ſo. *He ſaid, he deſired it to be read in that light*; and in that light it was read, and is as follows:

" I *Edward Thoroton Gould*, of his Majeſty's own regiment " of foot, being of lawful age, do teſtify and declare, that on " the evening of the 18th inſtant, under the orders of *General* " *Gage*, I embarked with the light infantry and grenadiers of " the line, commanded by colonel *Smith*, and landed on the " marſhes of *Cambridge*, from whence we proceeded to *Lex-* " *ington*: On our arrival at that place we ſaw a body of pro- " vincial troops armed, to the number of about 60 or 70 men. " On our approach they diſperſed, and ſoon after, firing began; " but which party fired firſt I cannot exactly ſay, as our troops " ruſhed on ſhouting and huzzaing previous to the firing, which " was continued by our troops ſo long as any of the provincials " were to be ſeen: From thence we marched to *Concord*. On

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" a hill near the entrance of the town, we saw another body of " the provincials assembled. The light infantry companies were " ordered up the hill to disperse them; on our approach they " retreated towards *Concord*; the grenadiers continued the road " under the hill towards the town; six companies of light infan- " try were ordered down to take possession of the bridge; " which the provincials retreated over; the company I com- " manded was one; three companies of the above detachment " went forward about two miles; in the mean time the provincial " troops returned to the number of about three or four hundred; " we drew up on the *Concord* side of the bridge; the provincials " came down upon us, upon which we engaged and gave the " first fire. This was the first engagement after the one at " *Lexington*; a continued fire from both parties lasted through " the whole day; I myself was wounded at the attack of the " bridge, and am now treated with the greatest humanity, " and taken all possible care of by the provincials of *Meel-* " *ford*. Signed. *Edward Thoroton Gould*."

This, with what I have before reported, is the whole of the evidence. There was a motion made the other day in arrest of judgment, and many objections taken to shew, that the charge, as it stands upon this record, is insufficient in law to support any judgment. That there was no averment as to the state of the *Massachuset's* colony at that time; either that there were *riots*, insurrections, or a rebellion: No averment that the King had sent any troops; no averment that there was any skirmish or engagement; or the nature of it; how it began, or how it went on, or ended; and lastly, that it was not averred, " *that the* " *employment of the troops was by the King's authority*." The only objection, which had any colour in it, was that which I mentioned last: I thought then, and said, that the averment of the words being written " of and concerning the King's government," was an answer; but no precedent was cited or alluded to on either side. I fancy the Attorney General was surprised with the objection; but there was no precedent cited. I could not say upon my memory, whether *precedents* might not *require some technical form* of expression, as to that medium, through which words are averred to be written " *of the King's government*;" and if any flaw had happened, formally, technically, or verbally, though not at all founded in the sense or reason of the thing, I should in this case have been of the same opinion I was, in the case of an outlawry; that the defendant ought to have the be-

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nefit of it: And therefore I defired we might think of it for ſome time, that precedents might be ſearched, and the books looked into. We have duly weighed every thing: Precedents have been looked into; we have fully conſidered the information, all the objections that were mentioned, and all the objections we ourſelves could think of; and we are all clearly of opinion, *without any doubt*, that the information is ſufficient. An indictment or information muſt charge what in law conſtitutes the crime, with ſuch certainty as muſt be proved: But that certainty may ariſe from a *neceſſary* inference; in the manner ſettled in the caſe of the *King* and *Lawley* in *Strange* *. Plain words in a libel ſpeak for themſelves; if they are doubtful, their meaning muſt be aſcertained by an *innuendo*. Here the words are plain; and want no *innuendo*: They are averred to be written "of and concerning the King's "government and the employment of his troops." The obvious meaning is, that the *employment* of the King's troops muſt be under his authority: and neceſſarily ſo when the words preceding are "of and concerning the King's government." This muſt now be taken to be true; becauſe the verdict finds it. Had the queſtion ariſen upon a demurrer, it muſt equally have been taken to be true.—The *giſt of every charge of every libel conſiſts in the perſon or matter of and concerning whom* or *which* the words are averred to be ſaid or written. In the *King* verſus *Alderton* † the information was held bad, becauſe it was *not* laid in the information, that the libel was "of and concerning the "juſtices of *Suffolk*." Where the words are averred to be "of "*and concerning the King's government*" or "of *the government* "*of the kingdom*," or "*of the government of the navy*," as to any thing further of which they are alſo written, or any *particular circumſtances* mentioned in the libel, through the medium of which it calumniates the King's government, *they* need not be particularly noticed in the *introductory* part of the information; nor is any technical form of expreſſion neceſſary. It cannot be; becauſe there may be caſes where the King's government might be calumniated through an imputation upon the groſs licentiouſneſs of his troops. The only queſtion to be tried is, "Whether the words laid, are written of the King's govern-"ment?" It may vary the *degree* of miſchief, malice or guilt; but it is totally immaterial as to the *conſtitution* of the crime upon the record, whether the words refer to ſomething that has exiſted, and miſrepreſent ſuch exiſtent facts, or are an entire *fiction*. Had *Lexington* been left out; or had any other place, where

* 2 Str. 904.

† Paſch. 29. Geo. 2. B. R.

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where there had been no ſkirmiſh, or engagement, been mentioned as the ſcene inſtead of *Lexington*; it would without any *innuendo* have been equally a libel, if meant to impute the ſame kind of miſconduct to the King's troops acting under his authority. It is the duty of the jury to conſtrue plain words and clear alluſions to matters of univerſal notoriety, according to their obvious meaning, and as every body elſe who reads muſt underſtand them. But the defendant may give evidence to ſhew they were uſed upon the occaſion in queſtion, in a different or in a qualified ſenſe. If no ſuch evidence is given, the natural interpretation of the words, and the obvious meaning to every man's underſtanding, muſt prevail. Before this trial, *five* different juries had found theſe words, from their *neceſſary meaning*, to be "*of and concerning the King's government.*" In this caſe the defendant gave evidence: But the evidence he gave plainly *demonſtrated* that the words related to troops *acting under the King's authority*; and conſequently, that the libel was "concerning the *King's government*;" for the military department is one branch of government. I am the more confirmed that upon this occaſion there is *little doubt of any real flaw* in the information, becauſe, in thoſe five trials I allude to, a *great variety of counſel of learning, eminence, and ability, were employed*, who were called upon to pry, with all the acuteneſs they had, into the information, to diſcover a flaw in it: But there were *five* judgments paſſed upon the ſeveral defendants: And no counſel ſaw or imagined there was any ſuch objection as the preſent: Upon the whole, we are all ſatisfied that the information is ſufficient.

Mr. Attorney General then addreſſed the court, and Mr. *Horne* was heard in anſwer *; after which, Mr. Juſtice *Aſton* pronounced the judgment of the court as follows:

ASTON Juſtice.—*John Horne*, Clerk, you ſtand convicted upon an information filed againſt you by his Majeſty's Attorney General, of writing and publiſhing, and cauſing to be printed and publiſhed, a falſe, wicked, and ſeditious libel of and concerning his Majeſty's government, and the employment of his troops. The libel has been openly read in court from the record; and, upon the report of his lordſhip who tried this information, it appears that, upon your own croſs-examination of one of the witneſſes, you gloried in the publication of it; that you avowed you did not deſire to be ſcreened; and avowed your-

* See the ſpeeches at large in vol. xi. *State Trials*, new edition, 291, *& ſeq.*

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ſelf the author of it. Since that indeed, in this court, you are tempted to gloſs over parts of this libel, and to confine its tendency to a poſſible *private* charge upon the King's troops, and not concerning his Majeſty's government; to treat the word "*troops*" as indeterminate in it's ſignification, and not to carry with it the conſtruction which the information avers, and which the jury have found, of its "concerning the King's government "and the employment of thoſe troops by *his authority*." You have ſaid, very truly, that evidence is not to ſupply any defect in an information. There is no defect in the information; the information ſets forth the libel at large; and the information charges that libel to be "of and concerning his Majeſty's govern-"ment," as I before mentioned. Upon that, the court has now decided agreeable to the finding of the jury; and no man can really miſtake the malicious *meaning* and *inſinuation* of it. It is a libel which contains a moſt audacious inſult upon his Majeſty's adminiſtration and government, and the conduct of his loyal troops employed in *America*. It treats thoſe *diſaffected* and *traiterous* perſons, who have been *in arms and in open rebellion* againſt his Majeſty, as faithful ſubjects—faithful to the character of *Engliſhmen*; and it falſely and ſeditiouſly aſſerts, that, "for that "reaſon only, they were inhumanly murdered by his Majeſty's "troops at *Lexington* and *Concord*." By the ſame libel, ſubſcriptions too are propoſed and promoted for the families of thoſe very *rebels* who *fell in that cauſe*, traiterouſly fighting againſt the troops of their lawful ſovereign. This is the light in which this libel muſt appear to every man of a ſound and impartial underſtanding; this is the plain and unartificial ſenſe of it. The contents of this libel have been too effectually ſcattered and diſperſed by your means, as charged in the ſeveral counts of the information, and they have been inſerted in divers and different newſpapers; the contents are too well known, and I truſt abhorred, to need any repetition from me, for the ſake of obſerving farther upon their malice, ſedition, and falſehood. The court have conſidered of the puniſhment fit to be inflicted upon you for this offence: And the ſentence of the court is—That you do pay a fine to the King of 200 *l.*; that you be impriſoned for the ſpace of twelve months, and until that fine be paid; and that upon the determination of your impriſonment, you do find ſureties for your good behaviour for three years, yourſelf in 400 *l.* and two ſureties in 200 *l.* each.

After-

Afterwards the defendant brought a writ of error in the Houſe of Lords, which was argued by the Attorney and Solicitor General for the crown, and by Mr. *Dunning* and Mr. *Lee* for the defendant. 1777. — — — Rex *verſus* Horne.

After counſel on both ſides had been fully heard, the following queſtion was put to the Judges: "Whether the writing "contained in the information, was, in point of law, ſufficiently charged to be a libel upon his Majeſty's government?"

Lord Chief Juſtice *De Grey* delivered the unanimous opinion of all the Judges in the affirmative, and gave his reaſons, as follow: *Monday, May 11th. 1778.*

My Lords, I have conferred with the Lord Chief Baron, and the reſt of my brethren the Judges, upon the queſtion which your Lordſhips have propounded to us; and I am deputed by them to deliver their unanimous opinion to your Lordſhips upon it.

The queſtion is, "Whether the writing deſcribed in the information, is *ſufficiently charged* to make it a libel upon his "Majeſty's government?"

By the words "*ſufficiently charged*" I underſtand to be meant, Whether it is charged with ſufficient certainty? But, though the law requires certainty, we have no preciſe idea of the ſignification of the word; which is as indefinite in itſelf as any word that can be uſed. Lord *Coke*, ſpeaking of it, repreſents it thus: * "There are *three* kinds of certainties: Certainty "to a certain intent in general; certainty to a common intent; "and certainty to a certain intent in every particular." This *laſt* is rejected in all caſes, as partaking of too much ſubtlety. The *ſecond* is ſufficient in *defence*; the *firſt* is required in a *charge* or accuſation. * Co. Litt. 303. a & 5 Co. 121.

Perhaps this account of it does not convey a much clearer idea; but I apprehend it will become intelligible, by conſidering the grounds of the diſtinctions taken in the preſent caſe, upon the certainty required in a charge.

The charge muſt contain ſuch a deſcription of the crime, that the defendant may know what crime it is which he is called upon to anſwer; that the jury may appear to be warranted in their concluſion of "guilty" or "not guilty" upon the premiſes delivered to them; and that the court may ſee ſuch a definite crime, that they may apply the puniſhment which the law preſcribes.

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This I take to be what is meant by the different degrees of certainty mentioned in the books: And it consists of two parts; the *matter* to be charged; and the *manner* of charging it.

As to the *matter* to be charged, whatever circumstances are necessary to constitute the crime imputed, must be set out; and all beyond are surplusage. And therefore, in the instance of the prosecution for perjury which has been cited[a], it was necessary to set out the oath, as an oath taken in a judicial proceeding and before proper persons, in order to see whether it was an oath which the court had jurisdiction to administer. In the prosecution of a constable for not serving the office[b], it is necessary to set out the mode of his election; because, if he is not legally elected, he cannot be guilty of a crime in not serving the office. Where the circumstances go to constitute a crime, they must be set out:—Where the crime is a crime independently of such circumstances, they may aggravate, but do not contribute to make the offence.

[a] *Cro. Eliz.* 337.

[b] 5 *Mod.* 96.

To apply these principles to the case of a libel: It may happen, that a writing may be so expressed, and in such clear and unambiguous words, as that it may amount of itself to a libel. In such a case, the court wants no circumstances to make it clearer than it is of itself: And therefore, all foreign circumstances introduced upon the record would be only matter of supererogation. But, if the terms of the writing are general, or ironical, or spoken by way of allusion or reference, although every man who reads such a writing may put the same construction upon it, it is by understanding something not expressed in direct words; and it being a matter of crime, and the party liable to be punished for it, there wants something more. It ought to receive a judicial sense, whether the application is just: And the fact, or the nature of the fact, on which that depends, is to be determined by a jury. But a jury cannot take cognizance of it, unless it appears upon the record; which it cannot do without an averment.

Thus much is sufficient to be said, in regard to the *matter* that is necessary to be averred.

Secondly, as to the *manner* of making the averment: There are cases, where a *direct* and positive averment is necessary to be made in *specific* terms; as, where the law has affixed and appropriated technical terms to describe a crime; as in murder, burglary, and others. It is likewise true, that in all cases, those *facts* which are *descriptive* of the *crime*, must be introduced upon

upon the record by *averments*, in oppoſition to argument and *inference*. In the caſe of a libel which does not in itſelf contain the crime, without ſome extrinſic aid, it is neceſſary that it ſhould be put upon the record, by way of *introduction*, if it is *new* matter; or by way of *innuendo*, if it is only matter of *explanation*. For an *innuendo* means nothing more than the words, "*id eſt*," "*ſcilicet*," or "*meaning*," or "*aforeſaid*," as, explanatory of a ſubject matter ſufficiently expreſſed before; as, ſuch a one, *meaning* the defendant, or ſuch a ſubject, *meaning* the ſubject in queſtion. But as an *innuendo* is only uſed as a word of explanation, it cannot extend the ſenſe of the expreſſions in the libel beyond their own meaning; unleſs ſomething is put upon the record for it to explain. As in an action upon the caſe againſt a man for ſaying of another, "He has burnt my barn*," the plaintiff cannot there, by way of *innuendo*, ſay, *meaning* "his barn *full of corn*;" becauſe, that is *not* an *explanation* of what was ſaid before, but an *addition* to it. But if in the introduction it had been averred, that the defendant had a barn *full of corn*, and that in a diſcourſe about that barn, the defendant had ſpoken the words charged in the libel of the plaintiff; an *innuendo* of its being the barn full of corn would have been good: For by coupling the innuendo in the libel with the introductory averment, "his barn full of corn," it would have made it compleat.

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* 4 *Co. Berham's caſe.*

And I conceive, that this kind of *extrinſic* matter may be introduced upon the record, either by *direct averment*, or by *recitals*, or by *general inference*; and that ſuch introductory matters and explanatory *innuendos* ſo made to appear upon the record, do all amount to ſufficient averments.

An *innuendo* is an averment, that *ſuch a one*, means ſuch a *particular perſon*; or, that ſuch a thing, means ſuch a particular thing: And, when coupled with the introductory matter, it is an averment of the whole connected propoſition, by which the cognizance of the charge will be ſubmitted to the jury, and the crime appear to the court.

The libel in the preſent caſe ſays, "That the ſubſcription "propoſed to be entered into, was for the relief of the widows, "orphans, and aged parents of our beloved *American* ſubjects; "who faithful to the character of *Engliſhmen*, and preferring "death to ſlavery, were for that reaſon only inhumanly mur-"dered by the King's troops." It is not neceſſary to conſider, whether this libel comes within the deſcription of a libel, which conſtitutes

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conſtitutes a crime of itſelf, without any aſſiſtance of other circumſtances; or what our opinions upon that queſtion might be; becauſe, we are all of opinion, that there is ſufficient matter expreſſed with ſufficient certainty, to conſtitute the crime.

But, two queſtions have been made upon the introductory part of this information: Firſt, Whether, the *interior* ſubſequent matter, being introduced by the words, "Of and concerning "his Majeſty's government, and the employment of his troops," theſe words amount to a ſufficient averment to put it legally upon the record? And ſecondly, Whether, admitting it to be legally put upon the record, the ſenſe of it muſt be underſtood to be a libel upon his Majeſty's government?

And firſt, "Whether it is legally put upon the record in "point of form?"—It is put upon the record by theſe words:— "That the defendant wrote and publiſhed ſuch a libel, *of and* "*concerning* his Majeſty's *government* and the *employment of his* "*troops*." This is an averment; for the fact is, that "He "wrote and publiſhed the libel;" and the circumſtance connected with that fact, and which therefore makes a part of it is, that "He wrote and publiſhed the paper or libel, *of and con*- "*cerning* his Majeſty's *government* and the *employment of his* "*troops*." If the jury, upon the defence ſet up, had found that the libel was not publiſhed relative to the King's government, or the employment of his troops; the information was not proved: for it contains an *entire* propoſition. And if it had appeared, that the paper related to a *voluntary* act of the troops only, and not to an employment of them by government, the information would have been falſe: becauſe the proſecutor would have failed in the proof of the propoſition, that it was written, "*Of and concerning the King's government and the em*- "*ployment of his troops*."

This is no new doctrine: The caſes cited at the bar ſhew it. In *Tuchin's* caſe* one part of the libel was this:—"The miſ- "managements of the navy have been a greater tax upon the "merchants, than the duties raiſed by parliament." It might have been ſaid there, *What navy? Whoſe navy?* Was it the navy of *England?* or did it mean only the merchant ſhips? The information charged, that the defendant had written a ſcandalous and ſeditious libel; in which the information ſtated in the *introductory* part, that "*Of and concerning the royal navy* of this "kingdom and the government of the ſaid navy, it is written ſo "and

* *State Trials, vol. 5. 590.*

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" and ſo.,, When the information came, in ſtating the libel, to the word " *navy*," by an *innuendo*, it explains it thus: " *meaning*, the *royal navy* of this kingdom;" which, being coupled with the averment in the introductory part of it, made the ſenſe and the charge compleat. Again, in another part of the ſame information for another libel, one part of the libel was thus: " There is another plot againſt you:" and afterwards, " it is a plot preparatory to your trial." What trial? The introductory part of the information charged, that this libel was written, " *Of and concerning the defendant*, and a proſecution " to be had againſt him for divers ſeditious libels by him, be- " fore that time, compoſed and publiſhed." The information afterwards explains " *you*" thus; meaning " the defendant." *This, connected* with the averment in the introductory part, was a ſufficient explanation of the charge. The defendant was found guilty of the ſeveral libels in the information. He moved in arreſt of judgment; but *not* upon the ground of the *inſufficiency* of the averments; for it was ſufficiently underſtood, that, " Of " and concerning the royal navy, *&c.*" was good without any other additional averments. In the caſe of *Rex* verſus *Matthews**, which was an indictment upon ſtat. 6 *Ann. c.* 7. the words of the libel were theſe; " From the ſolemnity of the *Chevalier's birth*, " and if hereditary right be any recommendation, he has that to " plead in his favour." It was there ſaid, *What Chevalier?* Who was he? What recommendation? And to what thing?— In the introductory part, the information charged the libel to have been written, " Of and concerning the Pretender," and " Of and concerning his right to the crown of *Great Britain*." And it was held, that the *innuendos* in the body of the libel, explaining the words " *Chevalier, &c.*" to mean the *Pretender* and his *hereditary right* to the *crown* of *Great Britain*, when connected with the averments in the introductory part, of its being written " Of and concerning the Pretender and his right " to the crown of *Great Britain*," were a ſufficient explanation to make good the charge.

* *State Trials, vol.* 9. *p.* 682. *et. ſeq.*

In the caſe of *Rex* verſus *Alderton*†, the libel there was an advertiſement, reciting certain orders made for collecting money on account of the diſtemper amongſt the horned cattle, adverti- ſed by the clerk of the peace for the county of *Suffolk*; and it charged, that by theſe orders the money collected had been improperly applied.—The information charged this to be a libel on the juſtices of *Suffolk*. In the *body* of the libel, it was *not*

† *Sayer's Reports* 280.

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ſaid, "*by order of the juſtices*," nor did the information in the *introductory* part ſay, that it was a libel "*of and concerning* the "juſtices of *Suffolk*." But when the information came to ſtate any of the orders in the advertiſement, it added this *innuendo*; meaning "An order of the juſtices of peace for the county of "*Suffolk*." But theſe *innuendos* could not ſupply the want of an averment in the introductory part, of its being written of and concerning the juſtices; becauſe they were not explanatory of, but in addition to, the former matter; and the court were of opinion, that the information having omitted the words, "*Of* "*and concerning the juſtices*", in the introductory part, ſuch omiſſion was fatal: And judgment was accordingly arreſted.

From theſe caſes it is clear, that the words "*Of and concern-* "*ing*" are a ſufficient introduction of the *new* matter. And therefore in the preſent caſe it is, in point of form, a ſufficient averment upon the record, that the paper was written "Of and "concerning the King's government."

But *ſecondly*, it has been argued upon the further charge reſpecting the troops, that it does not import that theſe troops were ſo employed by act of government. And therefore, though it ſhould be held to have been written, "*Of and concerning the* "*King's government*," yet it does *not* appear to be ſo, *relative to the act of the troops*. It has been further argued, that in giving their opinion upon this point, "The judges can take no know- "ledge of any thing that is ſaid or written, but what they can "collect from the record;" and likewiſe, "That every accu- "ſation taken from the record muſt be plain and clear; and is "not to be ſtrained by any forced meaning or conſtruction." But, as the crime of a libel conſiſts in conveying and impreſſing injurious reflections upon the minds of the ſubject; if the writing is ſo underſtood, by all who read it, the *injury is done* by the publication of theſe injurious reflections, *before* the matter comes to the jury and to the court. And if courts of juſtice were bound by law to ſtudy for any one poſſible or ſuppoſable caſe or ſenſe, in which the words uſed might be innocent, ſuch a ſingularity of underſtanding might ſcreen an offender from puniſhment; but it could not recall the words, or remedy the injury. It would be ſtrange to ſay, and more ſo to give out as the law of the land, that a man may be allowed to defame in one ſenſe, and to defend himſelf by another. Such a doctrine would indeed be pregnant with the *aimia ſubtilitas*, which my Lord *Coke* ſo juſtly reprobates.

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The true rule to go by is laid down by my Lord *King* in the caſe of *Rex* verſus *Matthews* *, which is this: "*That the court* "*and jury muſt underſtand the record as the reſt of mankind do.*"

This being the rule, and the accuſation ſuch as I have before ſtated, it remains to be ſeen only, what the words in the preſent caſe are. They are theſe, "That the defendant, of and con- "cerning the *King's government and the employment of his troops*," ſaid "that innocent ſubjects had been inhumanly murdered by "the King's troops only for preferring death to ſlavery." Do theſe words import in their natural and obvious ſenſe, that the King's troops were employed by the act of government, inhumanly to murder the King's innocent ſubjects?——There can be no doubt but that the King's government comprehends all the executive power of the ſtate both civil and military. That he employs all the national force, and that his troops are the inſtruments with which part of the executive government is to be carried on. The introductory part of this information charges, that the ſubject of the writing in the preſent caſe was, "The "troops, and the *King's troops*, and the buſineſs they had done."

* State Trials, vol. 9. 710.

It has been truly ſaid, that the King's troops may, like other men, act as individuals: But they can be *employed as troops* by the act of *government only*. If the averment therefore amounts to this, that, in the diſcourſe which was held, the words were ſaid "*of and concerning the King's government;*" the natural import of them, without any forced or ſtrained meaning, appears to us to be this; I am ſpeaking of the King's adminiſtration of his government relative to his troops, and I ſay, "that our "fellow ſubjects, faithful to the character of *Engliſhmen*, and pre- "ferring death to ſlavery, were for that reaſon only inhumanly "murdered by the King's order; or the orders of his officers." The motive imputed tends to aggravate the inhumanity of the act, and conſequently, of the imputation itſelf: Becauſe it arraigns the government of a breach of public truſt, in employing the means of the defence of the ſubject, in the deſtruction of the lives of thoſe who are faithful and innocent.

As to any other circumſtances not ſtated in the information; if thoſe which are ſtated, do of themſelves conſtitute an offence, the reſt ſuppoſed by the defendant, whether true or falſe, would have been only matter of aggravation, and not any ingredient eſſential to the conſtitution of the crime, and therefore not neceſſary to be averred by the record.

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Upon the whole of the caſe, therefore, we are unanimouſly of opinion, that the record contains "All facts and circumſtances "neceſſary to warrant the concluſion of the jury. And that it "likewiſe contains, all facts and circumſtances neceſſary for "the information of the court to give their judgment upon the "occaſion."

Whereupon it was ordered and adjudged, that the judgment, given in the court of *King's Bench* for the King, be *affirmed*, and the record remitted, *&c.*

Friday, Nov. 21ſt.

Lord *Manſfield* was abſent, having given his opinion in the year 1757.

DOE *ex dim.* ATKYNS, *verſus* HORDE *et al.*

IN ejectment for lands in *Glouceſterſhire*, upon not guilty pleaded, the jury found a ſpecial verdict ſtating in ſubſtance as follows:

That Sir *Robert Atkyns*, the elder, was, on the 8th of *June* 1699, ſeiſed in fee of the premiſes in queſtion, and being ſo ſeiſed, on the 12th of *June* 1699, made and executed three ſeveral indentures: By one of which (called the *leſſer deed*) dated the 12th of *June* 1699, made between Sir *Edward Atkyns*, Sir *Robert Atkyns* (ſon of Sir *Edward Atkyns*,) and Dame *Mary* his wife, of the one part, and Sir *Edward Carteret* and *John Lowe* gent. of the other part; *it was witneſſed* that in conſideration of Dame *Mary* releaſing a *former* jointure and of a *new proviſion* to be made for her, Sir *Robert* covenanted, that he, Sir *Edward*, and Dame *Mary* would, before the end of *Michaelmas* Term then next enſuing, *levy a fine* of the premiſes, to the uſe of Sir *Robert* for life, remainder to the uſe of Dame *Mary* for life for her jointure, remainder to Sir *Robert Atkyns*, ſon of Sir *Robert Atkyns* in tail male, remainder to the right heirs of Sir *Robert Atkyns* the father for ever.

The other two deeds were a leaſe and releaſe, dated the 11th and 12th of *June* 1699, reſpectively. By the releaſe (called the *greater* deed) made between Sir *E. Atkyns*, Sir *R. Atkyns* the father, and Dame *Mary* his wife, *Philip Sheppard*, Eſq; Sir *Clement Farnham*, and *Edward Atkyns*, of the *firſt part*; Sir *George Carteret*, Sir *Edward Carteret*, *John Lowe*, Lord *Hinchinbrooke*, Sir *Philip Carteret*, and *Edward Swift*, Eſq; of the *ſecond part*; Sir *Robert Atkyns* the ſon, and *Lovis Carteret*, daughter of Sir *George Carteret*, of the *third part*; *it was witneſſed*, that in conſideration of a marriage theretofore had between Sir *Robert Atkyns* the father

ther and Dame *Mary* his wife, and alſo of a marriage ſhortly to be had between Sir *Robert Atkyns*, the ſon, and the ſaid *Lovis Carteret*, and in conſideration of 6,500 *l.* the marriage portion of the ſaid *Lovis Carteret*; and for a proviſion for Dame *Mary*, the wife of Sir *Robert Atkyns*, the father, in the nature of a jointure, and alſo for the jointure of the ſaid *Lovis*, Sir *Edward Atkyns*, and Sir *Robert*, the father, *releaſed* the premiſes in queſtion to Sir *Edward Carteret* and *John Lowe*, to the *uſes* of the *leſſer deed*; with a proviſo, that Sir *Robert Atkyns* the father, Sir *Robert Atkyns*, the ſon, and *Lovis Carteret* reſpectively, when in poſſeſſion of the freehold, might make leaſes for *three lives* or 21 years, reſerving the uſual rents; with a further proviſo, that Sir *Robert Atkyns*, the father might appoint the manor of *Lower Swell*, *Upper Swell*, and *Stow in the Would*, as a jointure for any *future wife*; with a like power to Sir *Robert*, the ſon, in reſpect of the lands ſettled in jointure upon *Lovis Carteret*: And Sir *Robert* the father, covenanted to levy a fine before the end of the next *Michaelmas* Term to the uſes before mentioned.—That in *Trinity* Term 1669, a fine was levied of the premiſes in queſtion.—That on the 6th of *July* 1669, Sir *Robert* the ſon married *Lovis Carteret*.—That Dame *Mary* *died* on the 2d *March* 1680. That afterwards Sir *Robert Atkyns* the father, on the 26th *April* 1681, in conſideration of a marriage then intended to be had between him and Mrs. *Ann Dacres*, by indenture of that date, made between himſelf of the one part, and Sir *obert Dacres*, *John Dacres*, and *Ann Dacres* of the other part, *aſſigned* the premiſes in queſtion *in purſuance of his power* to *Ann Dacres* for life for her jointure; and married her on the 28th of *April* 1681.—That by indenture of the 27th *April* 1681, between *Ann Dacres* of the firſt part, Sir *Robert Atkyns*, the father, of the ſecond part, and Sir *Edward Atkyns*, reciting the indenture of 26th *April* 1681, and the aſſignment of the premiſes therein mentioned, but that *nevertheleſs it was agreed that only part of the ſaid premiſes was* to be ſettled on the ſaid *Ann* for her jointure, and the other part was to be re-conveyed, it was *witneſſed* and declared, that the ſaid other part ſhould be, and was re-conveyed to ſuch uſes as Sir *Robert Atkyns* ſhould appoint.—On the 27th of *May* 1708, Sir *Robert Atkyns* the father made his will, and thereby deviſed the reverſion of the premiſes, after the eſtate tail created by the deed of the 12th of *June* 1669, to *John Tracy* (taking the name of *Atkyns*) in tail, and if he died without iſſue then to *Ferdinando Tracy* the next younger ſon of *John*

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John Tracy in tail, and ſo on to other younger ſons, with an ultimate reverſion to *Richard Atkyns*, the elder ſon of Sir *Edward Atkyns*: and on the 9th of *February* 1709, *died* ſeiſed of the premiſes in queſtion; whereupon Dame *Ann*, his widow, *entered* on the ſame, claiming them for her jointure, and was in *poſſeſſion* thereof.—That by indenture 18th *May* 1710, Sir *Richard Atkyns* aſſigned the ſeveral terms in the deed of the 12th *June* 1699, to *Joſeph Walker*, in truſt for Sir *Robert Atkyns* the ſon and the heirs male of his body by Dame *Lovis* his wife.—That Dame *Ann* being in poſſeſſion of the premiſes, in *Trinity* Term, 9 *Ann.* 1710, an ejectment was brought againſt her on the demiſes of Sir *Robert Atkyns*, the ſon, and *Joſeph Walker*, when a general verdict was found for the plaintiff, and judgment entered up for *Philips*. That Sir *Robert*, the ſon, in purſuance of the ſaid judgment, *entered into and was in poſſeſſion* of the premiſes.—That *Philips*, on the 1ſt *January* 1710, ſurrendered the two terms mentioned in the declaration in ejectment to be demiſed to him, to Sir *Robert Atkyns*, the ſon, *then in poſſeſſion*.—That on the 17th *January* 1710, Sir *Robert Atkyns*, the ſon, being *ſo in poſſeſſion*, and *during the life-time of Dame Ann* the widow, made a *feoffment* of the premiſes to *James Earle* in fee, which feoffment was declared to be, for *docking*, *barring*, *and deſtroying* ALL ESTATES TAIL, uſes, reverſions and remainders in the premiſes; and for veſting the *fee* in Sir *Robert*, the ſon; *to hold* to *Earle*, to the *intent* and *purpoſe* that he might become perfect tenant of the freehold in order to ſuffer a recovery: The uſe of the ſaid recovery to be to Sir *R. A.*, the ſon, in fee—That *livery of ſeiſin* was, on the 20th *January* 1710, given to *Earle*, as appears by indorſement on the indenture of 17th *January* 1710. In *Hilary* Term, 9th *Ann.* 1710, a recovery was accordingly ſuffered, Sir *R. A.*, the ſon, and *Lovis* his wife being vouchees.—That on the 9th of *November* 1711, Sir *R. A.*, the ſon, died without iſſue.—That in *Hilary* Term, 10 *Ann.* an ejectment was brought againſt *Robert Atkyns*, Eſq; heir at law of Sir *R. A.*, the father, and of Sir *R. A.* the ſon, on the ſeveral demiſes of Dame *Ann* and *Thomas Dacres*; and in *Eaſter* Term 1712, a general verdict was given for the plaintiff on both demiſes; and judgment entered up. That immediately after, Dame *Ann* entered upon the premiſes, and continued in poſſeſſion thereof till 9th *October* 1712, when ſhe died.—That *Robert Atkyns*, Eſq; then entered, and was poſſeſſed till the 16th of *March* 1753, when he died without iſſue male, leaving

Ann

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Ann the wife of *Thomas Horde*, and *Elizabeth* the wife of *Edmund Chamberlayne*; his only children and co-heirs at law; having in his life-time by leaſe and releaſe of 30th and 31ſt *October*, 1713, ſettled the premiſes upon himſelf during the joint-lives of himſelf and *Elizabeth* his wife, with remainder to his firſt and every other ſon in tail male; with remainder to all and every his daughter and daughters in tail male, reverſion in fee to himſelf.—That *Elizabeth*, the wife of the ſaid *Robert Atkyns*, died on the 8th of *October*, 1739. That in *Eaſter* Term, 2 *Geo.* 2. 1729, *Edmund Chamberlayne* and *Elizabeth* his wife levied a fine of a moiety of the premiſes in queſtion: And in *Eaſter* Term, 24 *Geo.* 2. 1752, *Thomas Horde* and his wife levied a fine of the other moiety.—That *Ferdinando Tracy*, the third ſon of *John Tracy* of *Stanway*, died on the 3d of *May*, 1729, under age, and without iſſue male: *William*, the 6th ſon, died 15th *May*, 1729, without iſſue male: *Anthony*, the fourth ſon, died on the 29th of *May*, 1767. That *Robert*, the eldeſt ſon died on the 28th of *September* 1767, without iſſue male, in the life-time of *John Tracy*, the ſecond ſon, whereby the ſaid *John* became heir to his father. That on the 24th of *June*, 1770, *Thomas*, the fifth ſon died without iſſue male, he being at the death of *Robert*, the only younger ſon of his father. That on the 23d of *July*, 1773, *John* died without iſſue male. That *Richard Atkyns*, nephew of Sir *Robert Atkyns* the elder, and deviſee under his will, died in *December*, 1717, leaving *Edward Kinſey Atkyns* his heir at law, who died on the 4th of *July*, 1743, leaving *Edward Atkyns* his heir at law, who died on the 22d of *February* 1765, leaving *Edward Atkyns*, the leſſor of the plaintiff, his heir at law. The jury then find that *Edward Atkyns*, the leſſor of the plaintiff, after the death of *Thomas*, the fifth ſon, entered on the premiſes in the 2d count, and was ſeiſed; and being ſo ſeiſed, made the demiſe to the plaintiff of the 2d of *July*, 1770. They then find his entry on the premiſes in the fourth count, on the 11th of *April*, 1774, after the death of *John Atkyns*, the ſecond ſon; and the demiſe to the plaintiff on the 13th of *April*, 1774, who entered on the ſame day, and was ejected by the defendants.

This caſe was argued twice; firſt, in laſt term, by Mr. *Buller* for the plaintiff, and Mr. *Kenyon* for the defendants. And again in this term, by Mr. *Bearcroft* for the plaintiff, and Serjeant *Glynn* for the defendants. Lord *Mansfield* was abſent, having given his opinion on the queſtion in the year, 1757.

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Mr. *Buller* for the plaintiff, after ſtating the facts, argued as follows: The ſingle queſtion for the court to determine is, Whether, in the recovery ſuffered in *Hilary*, 1710, there was a *good tenant* to the *præcipe?* I am to contend there was not: And I ſhall conſider the effect of this recovery upon two grounds. 1ſt. On the judgment in ejectment, and the poſſeſſion under it. 2dly. Upon the feoffment. *Firſt*, Sir *Robert Atkyns* gained nothing but a *mere poſſeſſion* under the ejectment, without any freehold. The judgment was only to recover the *term:* Conſequently, the derivative right under it, could only be the *poſſeſſion* of the *term*. To ſupport the recovery upon this ground, it muſt be contended that Sir *Robert* was a *diſſeiſor* under the ejectment, and gained an *immediate freehold* to himſelf. But nothing ſhort of an actual *ouſter* could give him the freehold: For the true meaning and definition of a *diſſeiſin*, as laid down in the books, is, "when a man enters into any lands or tenements "where his entry is not lawful, and *puts him out who has the* "*freehold.*" *Litt. ſect.* 279. To conſtitute a diſſeiſin therefore, it muſt be without order of law, and by an *actual ouſter* of the perſon who has the freehold: And thereby, the party gains the freehold to himſelf. The ſame doctrine is laid down in *Co. Litt.* 181, & 153. *b.* alſo in *Bracton*, *lib.* 4. *cap.* 2. *fol.* 160. *cap.* 3. *fol.* 161. *b.* "A diſſeiſin is, where any one infeoffs an-"other of a *freehold* in prejudice of the true owner." Theſe authorities decide effectually what a diſſeiſin is; and that there may be a mere *wrongful poſſeſſion*, *without a diſſeiſin*. So alſo is the caſe of *Matheſon* verſus *Trott*, 1 *Leon.* 209. In the preſent caſe, though it is admitted that a fee was gained, yet the act itſelf amounting to a *wrongful poſſeſſion* only, and *not* to an *ouſter*; it is not a technical legal diſſeiſin. Again, in 3 *Salk.* 246, it is expreſsly held, "that to work a diſſeiſin or abate-"ment, there muſt be an *actual expulſion* of him who has the "right." Therefore under the judgment in ejectment in the preſent caſe, I contend there can be no diſſeiſin; becauſe the judgment and writ of poſſeſſion gave no *right* of freehold; but left *that*, juſt as it was before: and if the ejectors had no right, they might be turned out by another ejectment the next day. —There is a diſtinction that runs through all the caſes upon this ſubject, and reconciles the ſeeming contrariety between them; which is, that an entry may amount to a diſſeiſin for the ſake of advancing the remedy of him who has the right. *Cro. Car.* 303. *Palm.* 201. In the latter caſe. "tenant at will made a

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"leaſe for years: The original leſſor did no act upon the land, "but he made a will and deviſed it: And the court adjudged the "deviſe good; in as much as it was a ſtrong intimation that he did "not elect to admit himſelf diſſeiſed, but the contrary."—The caſe of Sir *Ambroſe Cane*, cited in *Cro. Car.* 303. is to the ſame purport. There was a later caſe, *Metcalf ex dim. Kynaſton* v. *Parry*, MSS. in *Scacc. Mich.* 1743. "Tenant in tail of lands, leaſed "by his father to a ſecond ſon for lives under a power, upon his "father's death received the rent from the occupier as owner, and "as if no ſuch leaſe had been made. He ſuffered a common re-"covery: And it was holden, that this was only a diſſeiſin of the "freehold *at election*, and therefore, there was no good tenant to "the *præcipe*." That caſe was preciſely the ſame as the preſent; except that this is rather ſtronger. Here Lady *Anne* could not even have elected to make it a diſſeiſin; becauſe the entry and poſſeſſion under the ejectment were not *injuſtè et ſine judicio*, which the writ of *novel diſſeiſin* always ſuppoſes. Neither could ſhe have *entered*: Becauſe after a judgment in ejectment obtained againſt her, the court would not have ſuffered her to get poſſeſſion unleſs by ſome other ſuit. If ſhe could have elected to make it a diſſeiſin, as far as ſhe could, ſhe did: For ſhe brought another ejectment, recovered poſſeſſion, and continued in poſſeſſion till her death. Therefore, ſuppoſing either the judgment in ejectment, or the feoffment to be a diſſeiſin, it was entirely done away by the ſubſequent poſſeſſion of Dame *Anne*. Sir *Robert* ſtands more in the light of *tenant by ſufferance*, than in that of a *diſſeiſor*: Becauſe his *poſſeſſion* was by *act of law*: and in *Coke Littleton*, 271. a diverſity is taken, "where one cometh to a "particular eſtate in lands by act of the party, and by act of "law:" Which is the caſe of tenant by ſufferance, who cometh to the poſſeſſion lawfully and then holdeth over.—Sir *Robert* entered by right in conſequence of the judgment in ejectment: But he afterwards held her over by wrong; becauſe the freehold was in another perſon.

Further, diſſeiſin is a *fact*, and therefore ought to have been found. Whereas, the verdict only finds that Sir *Robert* entered into poſſeſſion in purſuance of the judgment in ejectment; and does not ſay Lady *Anne* was ouſted. Conſequently, as it is not found, the court will not preſume it.

2dly, I am to conſider the *effect* of the *feoffment* to *Earle*. It is clearly a feoffment in *form* only, not in ſubſtance: Therefore it cannot have the effect of a feoffment to a third per-

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son for his own benefit. It was merely *fictitious*, for the benefit of Sir *Robert*, who continued in possession during the whole time. That circumstance alone is sufficient to make it void; and so it was determined in *White* v. *Bacon*, *Savil.* 126.—*Earle* never took the profits, nor was ever in possession: The feoffment was part of a family conveyance. If the persons making it had no power to convey, it could give no interest beyond what they themselves had. If it were held to go further, it would establish a precedent for every tenant in tail *in remainder*, with the concurrence of tenant for years only, to suffer a recovery against the consent of tenant for life, and so destroy half the family settlements in the kingdom. It would at the same time effectually destroy the established doctrine of recoveries, which makes the intervention of the tenant for life in possession indispensibly necessary.—Besides, this feoffment was secret and covinous: Therefore void within the doctrine of *Fermor*'s case, 3 *Co.* 77. and *Co. Litt.* 357. *b.* "That in all cases where a man hath a right-"ful and just cause of action, yet if he of covin and consent do "raise up a tenant by wrong against whom he may recover, the "covin doth suffocate the right, so as the recovery, though "it be upon a good title, shall not bind or restore the demandant "to his right." *Fitzherbert*'s case, 5 *Co.* 79. *b. S. P.* This latter case is exactly in point, for there the feoffment was by a person having merely a bare possession by fraud, with intent to bar the rights of third persons.—This is a most *unfavourable* case. Sir *Robert* got into possession by *mistake* of the law; and in consequence of that mistake, the present feoffment was made. But the law never works an injury.—If the feoffment were bad as being secret and covinous, no title can be *derived* under it. *Litt. sect.* 395. "If disseisor infeoff his father in fee, and the "father die seised, by which the lands descend to the disseisor as "heir, the assignee may well enter notwithstanding the de-"scent; and the disseisor shall be adjudged in but as a disseisor, "*quia particeps criminis.*" Here, Sir *Robert* was not only *particeps criminis*, but the only person criminal: for *Earle* never committed any disseisin. All that appears with respect to him is, that by indorsement upon the feoffment, livery was made to him: But that indorsement, for any thing that is shewn to the contrary, might be made without his privity. The disseisin was a fact which ought to have been found by the verdict, in order to enable the court to judge of it; and not being found, I hope the court will give the same opinion now, as was given in the year 1757.

Mr,

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Mr. *Kenyon*, *contra*, for the defendant.—On the former diſcuſſion of this caſe, great ſtreſs was laid upon the priority and poſteriority of the two deeds; but I ſhall confine myſelf merely to the operation of the feoffment by Sir *Robert*; and I admit, that if a feoffment could have no effect becauſe the party to whom it was made did not enter under it, and receive the profits, there would be an end of the queſtion. But the authorities in the books ſpeak a very different language: if they did not, every family ſettlement would be void. So, if the *non-privity* of the parties were to make it void, there would be an end of this queſtion; for then it would be void as to all the remainder-men and reverſioners.—It is ſaid, *diſſeiſin* is a *fact*. I ſay it is a *concluſion of law* from *facts*; and the great point here, is the operation of the feoffment in 1710.—The power of jointuring is *pro hâc vice* to be conſidered as well executed; therefore the queſtion is, whether that power ſtood in the way of Sir *Robert Atkyns*?—The ejectment and feoffment were to diſaffirm the title of Lady *Anne*; and there was no colluſion between the parties. It is ſaid Sir *Robert* got into poſſeſſion by miſtake. If a party gains a fee by right or by wrong, it is ſufficient to give him a power of making a tenant to the *præcipe*. If Sir *Robert* entered *with* a *title*, it was *as tenant in tail*, and the verdict ſuppoſes him to be ſo. If *without title*, I ſay he entered as a *diſſeiſor*, or at leaſt obtained ſuch a poſſeſſion as entitled him to convey in the terms of the feoffment. The authorities in ſupport of this poſition are to be found in 1 *Bur.* 60, 114. where the main driſt of the argument was, what it is now. It has been ſaid, that the party who is diſſeiſed, may conſider the perſon who enters, as *a diſſeiſor*, merely *for the benefit* of entitling himſelf to a writ of *novel diſſeiſin*, and to advance his remedy againſt him. I admit there are ſeveral caſes to be found which ſpeak to that effect; but not one of them applies to the caſe of a feoffment, except that of *Metcalf, ex dim. Kynaſton* verſus *Parry*. But the leaſt attention to that caſe will lay it entirely out of the preſent. There, *Kynaſton* being *tenant for life* with a *power of leaſing*, remainder in tail to his eldeſt ſon; made a leaſe to the *ſecond* ſon. The *eldeſt* entered and took poſſeſſion without obſtruction from the leſſee for life, received the rents and profits, and ſuffered a recovery which was held bad: But it was ſuffered before the ſtat. 14 *Geo.* 2. *c.* 20. How does that caſe apply here? There the tenant to the *præcipe* was made by leaſe and releaſe; if ſo, there was an end of it; but if the

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party had made it by *feoffment*, it would have been good. A leaſe and releaſe, bargain and ſale, or covenant to ſtand ſeiſed were innocent for the purpoſe; and by them he could not give what he had not: but the maxim "*nemo dat, &c.*" does not apply to the caſe of a feoffment. He refered to the general caſes relied upon by Mr. *Knowler*, in 1757, and cited *Popham.* 39. *Lit. ſect.* 599. *Hunt* verſus *Burn*, 1 *Salk.* 339. *Smith* verſus *Forteſcue*, 18 *Vin. Abr.* 413. In 3 *Atk.* 562, Lord *Hardwicke*, talking of the diſtinction between a feoffment and other conveyances, ſays, "if the defendant had a mind to gain "an eſtate by *wrong*, he ſhould have made a *feoffment with livery*, which would have been a *diſſeiſin*: and then a fine levied "afterwards, and five years non-claim, would have been a bar." In 3 *Atk.* 339. Lord *Hardwicke* ſays in effect the ſame thing; "that a bare entry with feoffment by livery will gain a ſeiſin." And 2 *Ver.* 481. is to the ſame effect as 3 *Atk.* 339. Theſe caſes alone ſhew it is the law of the land. All other conveyances are nothing to the purpoſe. Therefore *Earle* had an *eſtate of freehold* at the *time of the recovery*; and if he had, the recovery was *good*. With reſpect to the great inconvenience that has been mentioned, and the charge of colluſion, the beſt anſwer to them is, by aſking, why other inconveniences and wrongs which exiſt, remain unremedied? Why does collateral warranty deſcending, bar without any aſſets deſcending with it? Becauſe ſuch is the *lex ſcripta*. Why does the law protect a more remote eſtate, when it does not protect a nearer? Why may iſſue be barred? Why was the ſtat. *Hen.* 8. concerning fines with proclamations made?

It is ſaid that Sir *Robert* entered as *tenant by ſufferance*: I do not think it; nor as tenant in *any way*; for to enter as tenant, there muſt be a *privity* in the caſe; but there was no privity between Sir *Robert* and Lady *Anne*. Diſſeiſins make a conſiderable head of the law in this country, at leaſt, technical diſſeiſins. If there is a technical diſſeiſin in point of law, I hope the court will decide upon it, and adjudge that the recovery in this caſe is effectual.

Mr. *Buller* in reply. It is admitted that no perſon can ſuffer a recovery without the concurrence of tenant for life. In the preſent caſe, the recovery is not only *without* the *concurrence*, but *againſt* the expreſs *inclination* of tenant for life; therefore, clearly bad. It is likewiſe admitted, that if diſſeiſin is a fact, it ought to have been found. But it is ſaid diſſeiſin is not a

bare fact, but a concluſion of law from facts found. But the law ſays, "to make a diſſeiſin, there muſt be an actual "*ouſter*." And here no ſuch fact is found by the verdict. Then, though there was no colluſion between Sir *Robert* and Dame *Anne*, (and I never contended there was,) yet there was colluſion between Sir *Robert* and *Earle*. Again, it is ſaid Sir *Robert* was tenant in tail. Was he tenant in tail in poſſeſſion? If he was not, he did not ſtand in a ſituation to enable him to ſuffer a recovery. The fact is, that he was tenant in tail in *remainder* only, and a tenant for life ſtanding out againſt him. As to the doctrine laid down in 1 *Salk.* 339. and the other caſes cited to the ſame point, they are diſtinguiſhable from the preſent. For none of them ſpeak of *private* feoffments where the poſſeſſion is not changed; but of public notorious feoffments with livery, upon the land; whereas the preſent is the caſe of a ſecret feoffment without any entry on the land or livery to the feoffee. Therefore there ought to be judgment for the plaintiff.

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There being ſo much in print upon this ſubject already, I have omitted the ſecond argument. After the counſel had finiſhed, Mr. Juſtice *Aſton* ſaid, the caſe was treated in a moſt able and maſterly manner in the reports of Sir *James Burrow* * That the court had looked into all the caſes there cited; and would now re-conſider them together with the arguments urged at the bar, and would give their opinions in the term. That the judgment in 1 *Bur.* 60. was a very great authority; but the court was now to give *their* opinion.

* 1 Bur. Rep. 60.

Cur. adv. vult.

Afterwards, on this day, Mr. Juſtice *Aſton* delivered the opinion of himſelf, Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt*, (Lord *Mansfield* continuing abſent,) to the following effect:

We have carefully examined all the caſes cited in the arguments at the bar and the reports; which, together with the facts of the caſe, I ſhall ſtate in the order in which they apply, that they may be the better underſtood.

Upon this record, the leſſor of the plaintiff's title ariſes, under the will of Sir *Robert Atkyns* the elder, as *deviſee* of a reverſion in fee, after a limitation of an eſtate in tail male, determined in the year 1711, upon the death of Sir *Robert Atkyns* the younger, without iſſue male. The defendant's claim is as lineal deſcendant, and heir at law, of Sir *Robert Atkyns* the elder; and the lineage and pedigree are ſupported by the facts found. The great queſtion upon the record is, "Whether a common reco-

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"very, suffered in the year 1710, by Sir *Robert Atkyns* the "younger, is a good recovery?" If it is, it has barred the lessor of the plaintiff's right. But that depends upon these circumstances: First, Whether Sir *Robert Atkyns* the younger was, at the time of the recovery suffered, tenant in tail in possession, or tenant in tail in remainder? and 2dly, if he was tenant in tail in remainder only, whether there was a good tenant to the *præcipe?*

As to the first question, it has been insisted, "That Dame "*Atkyns*, second wife of Sir *Robert Atkyns* the elder, had an "estate for life under the deed of the 26th *April*, 1681, pursuant "to a power contained in the great deed of the 12th *June*, 1669, "and that *she* did *not join* in any conveyance of the freehold, so "that there was no good tenant to the *præcipe*." In answer to this it has been said, "That she had no estate for life; for that "the deed called the *little* deed, bearing date likewise on the "12th *June* 1669, was executed after the *great* deed of the same "date, and that therein no mention is made of such power: "And that the power given to Sir *Robert Atkyns* the father, in "the greater deed was extinguished by a fine in 1669." The priority of these deeds of the same date not being found, the court must judge of that priority from all the circumstances of the case, the nature of the transaction, and the internal evidence of the instruments themselves. The little deed is declared to be made, "In consideration of Dame *Mary* releasing and acquit-"ting a former jointure, and for the purpose of making a new "provision for her according to the covenants specified in that "deed." What that former jointure was, does not appear; but the intention of the parties in this deed is manifest, that it was in order to facilitate the new family settlement. By Dame *Mary*'s having thus released and acquitted her former jointure, these lands were liable to the settlement that was to be made by the great deed, upon consideration of the new marriage there specified. The great deed makes no recital of this release and acquittal by Dame *Mary*; but it executes the covenant of the new jointure to be made to her: that is, by settling the very same premises on her as were settled by the little deed. It was therefore plainly a transaction of convenience and accommodation between the parties for their mutual benefit. And it would be harsh indeed, to construe the little deed as made subsequent to the great deed, when the great deed carries the provisions of the lease into execution. But by the contrary construction *both* deeds

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have their effect; and a conſtruction of that ſort ought to take place in all caſes; for the intent could never be, *uno flatu*, to create a proviſion by one deed, and to deſtroy it by the other. The fine levied compriſes all the premiſes in the greater deed. They are *partes ejuſdem negotii*, diſtinctly executed, and moſt probably for the convenience of the jointreſs Dame *Mary*; for ſhe had the cuſtody of one; and when ſhe died, it was placed amongſt the family writings. In addition to this the ſubſequent acts done by Sir *Robert* the father, ſtrongly prove that he conſidered the powers as ſubſiſting.

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We are therefore of opinion, that the *little deed* muſt be conſtrued to have been *firſt* executed; that the power of jointuring under the great deed did ſubſiſt, and was well executed; and that Dame *Anne* had an eſtate for life in the premiſes under the deed in 1681: And it is found by the verdict, that ſhe entered and was in poſſeſſion. If there was an eſtate for life in Dame *Anne*, Sir *Robert Atkyns* the younger could only be tenant in tail in remainder, expectant upon the determination of her eſtate for life.

The next queſtion is, "Whether there was a good tenant to "the *præcipe?*" The facts relative to this particular are, "That "Sir *Robert Atkyns* the younger, in purſuance of a judgment in "ejectment brought againſt Dame *Anne Atkyns*, and the tenant "in poſſeſſion of the premiſes, *Trin.* 9 *Ann.* by *John Phillips*, "upon the ſeveral demiſes of the ſaid Sir *Robert* and *Joſeph* "*Walker*, entered upon thoſe premiſes." Upon the 1ſt of *January*, 1710, *John Phillips* ſurrendered both theſe terms to Sir *Robert Atkyns* the younger; but it muſt be remembered that theſe were only *fictitious* terms; one of them, granted by Sir *Robert Atkyns* himſelf; and therefore, the recovery in ejectment could not change the nature of Sir *Robert Atkyns*'s poſſeſſion. Sir *Robert Atkyns* the ſon, being ſo in poſſeſſion, makes a feoffment with livery of ſeiſin to *James Earle* in fee, for *the declared purpoſe and intent of making him a tenant to the præcipe.* In *Hil.* Term, 9 *Anne*, a recovery was ſuffered by the premiſes, wherein *John Holmden* was demandant, *James Earle* tenant, and Sir *Robert Atkyns* the younger, and *Lovis* his wife, are the vouchees.—The validity of this recovery depends upon conſidering the *effect* of the judgment and poſſeſſion under the ejectment, and the *nature* of the ſubſequent feoffment to *James Earle.* It is ſaid, that if Sir *Robert* the ſon entered by wrong, he is a diſſeiſor: That, poſſeſſion only will ſupport a feoffment; (to which point there

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there are many authorities cited in 1 *Bur. Rep.* 92. 94.) and that the poſſeſſion itſelf in this caſe under the judgment in ejectment was a diſſeiſin.

Secondly, it is ſaid, if he came in by right, he would be in according to his title: that, the poſſeſſion and title would then unite, and together would give him a power to ſuffer a recovery.

To this it has been anſwered, and we are of opinion, 1. That the taking poſſeſſion under the judgment in ejectment, can never amount to a diſſeiſin of the freehold: for the definition of a diſſeiſin laid down by *Litt. ſect.* 279. is, "Where a "man entereth into any lands or tenements, where his entrance "is *not congeable*, and *ouſteth* him who has the *freehold*." So that *every entry* is *not* a *diſſeiſin*, unleſs there be likewiſe an *ouſter* of the freehold. *Littleton* therefore connects theſe two circumſtances together. So, *Coke* in his *Commentary* upon *Lit.* 153. ſays, "A diſſeiſin is the putting a man *out* of *ſeiſin*, and ever "implieth a wrong." But, "*diſpoſſeſſion* or ejectment, is a "putting *out* of *poſſeſſion*; and may be by right or by wrong." And again, "Diſſeiſin is a perſonal treſpaſs, or tortious *ouſter* of "the ſeiſin."

Now we obſerve, that it is not in fact found, "That Dame "*Atkyns* was *ever ouſted* of the *freehold*; or that Sir *Robert Atkyns* "the younger, was *ever ſeiſed* of it." The judgment in ejectment was a recovery of the poſſeſſion only, without prejudice to the right of thoſe in whom it might afterwards appear to be. That poſſeſſion therefore, gave no more right to Sir *Robert Atkyns* than he had before, and he might have been turned out by any ſubſequent ejectment. He did not take a tortious fee under the judgment, nor could the ſheriff deliver it; for the words of the writ are only "*Habere facias poſ-*"*ſeſſionem*."

Sir *Robert Atkyns* had no right at the time of the entry to an eſtate tail in poſſeſſion; for the jointreſs had then an eſtate of freehold. The ejectment could recover nothing but the poſſeſſion. Verdict and judgment gave him no more; no freehold was recovered under it, but only the term; though, if he really had a *right* of *freehold in poſſeſſion*, in tail, or in fee, the poſſeſſion under the ejectment would have *enured* according to the *right*.

An argument has been drawn from the power of the true owner to make his election, whether he will conſider it a diſſeiſin or not. But here, the true owner could not elect to make him

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a diſſeiſor: the entry not being *injuſtè et ſine judicio*; and Sir *Robert* would not have been liable to a fine, as antiently every diſſeiſor was. A true owner may enter upon an actual diſſeiſor; but here, the entry could not have been admitted; nor *did* Lady *Anne elect* to make Sir *Robert* a diſſeiſor; for ſhe afterwards brought her ejectment. For the doctrine of elective diſſeiſin I refer you to 1 *Bur. Rep.* 110, 111, 112. 1777. DOE *verſus* HOARE.

The ground therefore of our opinion is founded in this; that here, there was no actual nor conſtructive diſſeiſin; Sir *Robert Atkyns* gained no freehold by it, he had only a naked poſſeſſion: there was no *ouſter* of the true owner; but the freehold remained not diſplaced, with Dame *Anne*, remainder in tail to Sir *Robert Atkyns*.

The next queſtion is, Whether the feoffment made a good tenant to the *præcipe*, without the concurrence of the jointreſs? Sir *Robert Atkyns* not being tenant in tail in poſſeſſion, bargain and ſale, or fine, would not do. Feoffment would not make a diſcontinuance. 1 *Rol. Abr. tit. Diſcontinuance*, 634. *pl.* 5. Would it make a diſſeiſin? If it were taken to be a diſſeiſin, it muſt be at the election of the right owner, according to the doctrine laid down in 2 *Inſt.* 412, 413, for the ſake of the remedy. Sir *Robert Atkyns* the ſon had not the freehold in fact, for there was no expulſion of the true owner; it was a feoffment, with livery in *form* only; there was no tranſmutation of poſſeſſion to the feoffee. No eſtate, not even an intereſt, paſſed to *Earle* for his own uſe; it being made for the avowed purpoſe only of making him a tenant to the *præcipe*. Sir *Robert Atkyns* continued in poſſeſſion; the feoffment was no more than a part of that common aſſurance called a common recovery; and there was no thought of a diſſeiſin at the time: for on the facts found it is clear, that Sir *Robert Atkyns did* conſider himſelf as *tenant in tail in poſſeſſion, under* the judgment in *ejectment*; that the little deed was poſterior to, and corrected the great one, and that *no freehold ſubſiſted*, or ſtood out *againſt the tenant in tail*. But it turns out, that all this was grounded on a miſtake of Sir *Robert Atkyns*, and that Dame *Anne had* an eſtate for life for her jointure. The true meaning therefore of this feoffment was, to make a tenant to the *præcipe*, Sir *Robert Atkyns* conſidering himſelf as being tenant in tail in poſſeſſion, without any idea or intention of its working a diſſeiſin, and that thought was an afterthought.

But

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But as it is not every entry, ſo neither is it *every livery* that will make a *diſſeiſin*. Livery is of the very *eſſence* of a feoffment. But where the books ſpeak of feoffments in fee by tenant for years, and that the fee-ſimple paſſes thereby, it is to be underſtood of thoſe feoffments of old, attended with *livery* and *actual* tranſmutation of the poſſeſſion from one man to another. *Bract. book* 2. *c.* 18. *b.* 4. 161. *b. Year book*, 11 *Hen.* 4. 33. *pl.* 61. *a. Brooke Abr.* tit. *Feoffments de terres, pl.* 10. *Weſt. Symb. ſect.* 251. and many other authorities cited in the report by Sir *James Burrow*.—There was a *privity* and confidence between the particular tenant and the reverſioner. Tenant for years forfeited his eſtate by altering the poſſeſſion: And on account of ſuch poſſeſſion and the notoriouſneſs of the act of inveſtiture, the feoffee ouſted the reverſioner. It was a tranſlation of the feud from one man to another. But there was no idea of ſuch a change being worked by a private ſecret contract of the parties; becauſe that would make it difficult for the Lord to know with whom the eſtate was lodged, and for ſtrangers to bring their action. Such was the practice before men were acquainted with letters, when lands paſſed by parol; and livery was neceſſary to be made on the land, that the other tenants who were called to the lord's court might be witneſſes. I ſay, it was formerly neceſſary to be done, for this reaſon, becauſe the *pares curiæ* and the vaſſals of the lord, being bound by their oath of fealty, would take care that no fraud ſhould be committed, which ſtrangers, not held by the ſame tie, might connive at.

In *Wright*'s law of *tenures, p.* 151. he ſays, "a feoffment, "whether conſtituting, or transferring a fee, retains, even *at this* "*day*, the form of a gift. It is perfected and ratified by the "ſame ſolemnity of *livery* and *ſeiſin* or inveſtiture, as a pure feu"dal donation." Though, afterwards the ocular atteſtation of the *pares* was held unneceſſary, and livery might be made before any credible witneſſes; yet the trial has ſtill been reſerved to the *pares* or jury of the country; but the particular requiſites of this form of conveyance have dwindled away; they have, from having been the only conveyance of land for a long ſeries of years, languiſhed into a mere form, and are nothing more than a common conveyance. Their grandeur and efficacy is loſt; and without an actual transferring of the eſtate from one man to another, they mix with the community of all other aſſurances. In 3 *Atk.* 140. in the caſe of *Smith on the demiſe of Dormer* verſus *Parkhurſt*, Lord Chief Juſtice *Willes* treats

feoffments

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feoffments in the ſame light, when he ſays, "they materially "differ from a fine; for in notoriety of fact, a feoffment is ſup- "poſed to be made *openly upon the land*, and the feoffee is imme- "diately put into poſſeſſion:" Not a formal, but an actual poſ- ſeſſion.

The general notion of their being a ſecurity againſt ſecreſy and fraud, was a ſubſtantial reaſon which gave ſo much conſe- quence to the feoffments of old. The caſes of *Hunt* v. *Bourne* *, *Read* and *Morpeth* v. *Errington* †, and the caſes cited from *Vezey* ‡ to prove the ſuperiority of feoffments over fines, we conſider to mean ſuch feoffments of old; for they are mere *dicta*. With reſpect to the caſe from *Viner*, title Remainder, *p.* 414, I have a note of it of my own taking, and can venture to ſay, that Lord Chief Juſtice *Lee* did not rely upon the diſtinc- tion ſtated by the gentlemen at the bar. The name of theſe feoffments and the remembrance of them remains and ſurvives them, however imperfectly, after the practice of making them, and the conſequence of their ſolemnity is quite at an end. But the preſent feoffment is of a different ſort; it is *ſecret*, and by a wrong doer; and the feoffee, a *mere inſtrument*; for it is ſolely for the purpoſe of making him a tenant to the *præcipe*. In law therefore, he is a mere inſtrument, and ſo conſidered in 2 *Rol. Rep.* 245. *Cro. Jac.* 643. S. C. 1 *Mod.* 107. *Fountain* v. *Cooke*. —It is not here ſaid to be for his own uſe; nor need it be ſo, when it is merely for the purpoſe of making a tenant to the *præ- cipe*; but then, the party muſt have a *right* to ſuffer the recovery. If it is carried any further, it is fraudulent; and ſhall not be car- ried into execution by artificial reaſoning to the prejudice of thoſe who have the right. As to this point therefore, we concur with the authority of *Fermor's* caſe §, cited in Sir *J. Bur.* 117.

* *Salk.* 339.
† *Cro. Eliz.* 321.
‡ 2 *Ver.* 475, 6.
§ 3 *Co.* 87.

No aid can be given to this recovery from the ſtat. 14 *Geo.* 2. *c.* 22. becauſe it requires the concurrence of the firſt eſtate for life expreſsly. We think the recovery therefore, in the preſent caſe, bad: 1ſt, becauſe "there has been no *diſſeiſin* at all of "Dame *Anne*; 2dly, *no ouſter* of her *freehold*; 3dly, that the "feoffment was made really under an idea of having a right to "ſuffer a recovery, and not with any intention to conſtitute a "diſſeiſin. 4thly, If it were done with that intention, we think "it amounts to a feoffment in *form* only, and is not ſuch a feoff- "ment as was in uſe of old; no tranſmutation of the poſſeſſion "paſſed by it; but its object was ſecret and colluſive; and there- "fore it ought not to work a conſtructive diſſeiſin. *Laſtly*, That

"Sir

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" *Robert Atkyns* by his entry under the judgment in ejectment " gained no freehold; and by this feoffment conveyed no eſ- " tate to the prejudice of Dame *Anne's* freehold."

The conſequence is, that there muſt be judgment for the plaintiff.

Friday, Nov. 25th.

DOE, *ex dim.* WATSON *et al. verſus* ROUTLEDGE.

To make a *voluntary* ſettlement *void* againſt a ſubſequent purchaſor within the ſtat. 27 *El. c.* 4. it muſt be *covinous* and *fraudulent*; not *voluntary only*. A purchaſor, to entitle himſelf to the protection of the ſtatute againſt ſuch *fraudulent* ſettlement and to ſet it aſide, muſt be a purchaſor *bona fide*, or for *good conſideration*; as *marriage*: but the conſideration need not be money. *Quære*, If copyholds are within the ſtat. 27 *El. c.* 4.?

IN ejectment, the jury found a verdict for the defendant, ſubject to the opinion of the court on the following caſe:

That *William Watſon*, being ſeiſed in fee according to the cuſtom of the manor of *Hexham* of the copyhold tenements, mentioned in the declaration, on the 17th *December* 1763, executed a *letter of attorney to John Green*, authorizing him to *ſurrender* the ſame to the uſe of the ſaid *William Watſon for his life*, and after his deceaſe to the defendant *Routledge* (who was *his nephew* by a ſiſter) his heirs and aſſigns for ever; which ſurrender was accordingly made, on the 21ſt of the ſame *December*; and *William Watſon* was admitted thereupon. This was *voluntary*, and *without any conſideration, other than natural love and affection*.

That in the year 1767 the defendant paid his addreſſes to *Hannah Bell*; and a copy of the ſaid ſurrender was ſhewn by the defendant to her and her father; who thereupon gave their conſent to the marriage, which ſoon after happened.

That *William Watſon* afterwards, on the 11th of *January*, 1773, *ſurrendered* the ſame premiſes to the *uſe of Hugh Watſon*, the *leſſor* of the plaintiff in the firſt demiſe, and who was his *nephew* by a younger brother, his heirs and aſſigns for ever; and by a *deed* of the ſame date, executed by *William Watſon*, *reciting* that *Hugh Watſon*, upon the propoſal and *at the requeſt of William Watſon*, had come to an *agreement* with *William Watſon* for the abſolute *purchaſe* of the ſaid premiſes for the *ſum of* 200 *l.* and reciting the ſaid ſurrender; in purſuance thereof *William Watſon* acknowledges the receipt of the 200 *l.* from *Hugh Watſon*, in full for the purchaſe of the premiſes; and covenants with *Hugh Watſon*, that he, *William Watſon*, was owner of the premiſes, and had good right to ſurrender the ſame to *Hugh Watſon* and his heirs; that they might quietly enjoy the ſame, free from incumbrances; and that *William Watſon* and his heirs would make further aſſurance. There is a receipt on the back of the deed for the conſideration money, ſigned by *William Watſon*; and the money was proved to have been paid by *Hugh Watſon*

Watſon to *William Watſon*, at the execution of the deed. *Hugh Watſon* was on the 12th of *January*, 1773, admitted upon the ſaid ſurrender, and entered into poſſeſſion of the premiſes. 1777.

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That *Hugh Watſon*, ſome time *before*, and *at the time* of, the ſurrender to him in 1773, *knew* of the *former ſurrender* in 1763. That the premiſes, at the time of the laſt ſurrender to *Hugh Watſon*, were worth between 50 *l.* and 60 *l. per annum*; and the inheritance worth between 1800 *l.* and 2000 *l.* That *William Watſon* died on the 21ſt *January* 1774, and the defendant *Routledge* brought this ejectment; and thereby got poſſeſſion of the premiſes; *Hugh Watſon* then being a priſoner for debt in *Carliſle* gaol, having been committed on or about the 28th *April*, 1774, and making no defence to the action. That *Hugh Watſon* afterwards took the benefit of the inſolvent debtors' act; and that *Lowthian* and *Armſtrong*, the two leſſors in the ſecond demiſe, are aſſignees of all *Hugh Watſon*'s eſtate and effects under the ſaid act, by an aſſignment made the 7th *October* 1774. The queſtion was, Whether the plaintiffs were entitled to recover? and if they were, then a verdict was to be entered accordingly.

Mr. *Wood* for the leſſor of the plaintiff. The point made by the plaintiffs at the trial was, that the *firſt* ſurrender in 1763, being *merely voluntary*, was by force of the ſtat. 27 *El. c.* 4. null and *void*, in reſpect of the ſecond ſurrender in 1773, under which he claimed; he being therein a *bonâ fide* purchaſor of the premiſes in queſtion for a *valuable conſideration*. *E contra*, it was contended, on the part of the defendant, 1. That the ſtat. 27 *El. c.* 4. does *not extend to copyholds*: 2. That a purchaſor for the conſideration of 200 *l.* only, where the eſtate was fairly worth 2000 *l.* is not ſuch a purchaſor as the ſtatute meant to protect againſt a prior voluntary ſettlement.—As to the firſt point, the general words of the ſtatute, *viz.* "every eſtate in "lands, tenements, or other *hereditaments whatſoever*" are in themſelves clearly large enough to compriſe *every* ſpecies and denomination of eſtate of whatever quality. If ſo, there is no reaſon in law, policy, or common ſenſe, why they ſhould not be conſtrued to extend to copyholds. The diſtinction upon which copyholds, in ancient times, were adjudged not to be within the proviſion of ſome of the earlier ſtatutes, as the ſtat. of *Weſt.* 2. *de donis conditionalibus*, and the ſtat. 13 *Ed.* 1. of *elegits*, is foreign to this caſe. In thoſe times, copyholds were mere tenures in villenage; the ground therefore upon which they were

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were held to be excluded, unleſs particularly mentioned, was for the ſake of the lord, that ſtrangers might not be impoſed upon him againſt his conſent. But that reaſon has ceaſed long ago; and ſo it had, before the ſtat. 27 *Eliz. c.* 4; copyholds being at that time fixed and permanent, ſubject to alienation, and to every ſpecies of modification incident to freehold eſtates. The true rule to go by, is laid down in *Heydon*'s caſe, 3 *Co.* 8. where upon debate, in what caſes the general words of an act of parliament ſhall extend to copyhold eſtates, it was agreed by the whole court, "that where an act of parliament *alters* the *ſervice*, "tenure or intereſt in the land, in *prejudice* of the *lord* or *tenant*, "there the general words of ſuch act ſhall *not* extend to copy-"holds; but if made for the good of the weal public, and *no* "prejudice enſues to the *lord* or *tenant*, there, copyholds *are* "*within* the general purview of it:" and accordingly it was there adjudged, that copyholds were within that branch of the ſtat. 31 *Hen.* 8. *c.* 13. which avoids all leaſes by eccleſiaſtical perſons contrary to the proviſions there made. Now the principle of that caſe is particularly applicable to the preſent; both ſtatutes being made in ſuppreſſion of fraud; *that*, to prevent *fraudulent leaſes*; *this*, to prevent *fraudulent grants*. The above rule has been the leading principle in all ſubſequent caſes, 4 *Co.* 26. upon the ſtat. 32 *Hen.* 8. *c.* 9. againſt buying of titles. 9 *Co.* 104. *Margaret Podger*'s caſe upon the ſtat. 4 *Hen.* 7. *c.* 24. of fines. 6 *Co.* 37. upon the ſtatute 13 *El. c.* 10. *Glover* verſus *Cope*, 3 *Lev.* 326. *Carthew*, 205. S. C. upon the ſtat. 32 *Hen.* 8. *c.* 34. in which latter caſe, the court ſaid, "that the "only reaſon why copyholds have been adjudged not to be "within the purview of other ſtatutes is, becauſe of their be-"ing a prejudice to the lord." But here, no poſſible prejudice can ariſe to the lord; it can work no alteration in the ſervice, tenure or intereſt of the land; it will vary no cuſtom of the manor; nor can any injury ariſe to the tenant. No reaſon can be aſſigned either in policy or common ſenſe why the purview of the ſtat. 27 *El. c.* 4. ſhould not extend to copyholds; it is for the publick weal that it ſhould; and except a *dictum* of *Blencowe*, juſtice, in the *law of niſi prius* 108. there is no caſe or authority againſt it.—The *next queſtion is*, Whether the *conſideration* that paſſed in this caſe under the ſecond ſurrender, is ſuch a conſideration as will *defeat* the *firſt voluntary* ſettlement? As to this part of the caſe, *two* of the facts ſtated are totally immaterial. *1ſt.* The defendant's *marriage*; becauſe it does not appear, that either *William Watſon* or *Hugh Watſon* were *privy* to the firſt ſurrender being

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being ſhewn to the defendant's wife and her father, before the marriage. 2*dly*, That *Hugh Watſon* had *notice* of the firſt ſurrender. But it has been decided that ſuch notice makes no difference; becauſe the ſtatute expreſsly ſays, that ſuch fraudulent conveyance ſhall be void; 5 *Co.* 60. *Gooch*'s caſe. The ſingle queſtion therefore is, Whether a purchaſor for a *valuable conſideration*, but ſhort of the *full* value, ſhall defeat a mere voluntary purchaſor who has given no conſideration at all. Now the words of the ſtatute are, "for *money or other good conſider-*"*ation*," and they are repeated in different ſections; 2. 4, 5. But in no part of the ſtatute is it ſaid, "the *exact full* value muſt be "given;" nor do the words "*good conſideration*," in their natural acceptation and meaning, import "*full value.*" All they mean is that a *valuable conſideration* ſhall be given: And ſo are all the authorities in the books. *Twine*'s caſe, 3 *Rep.* 80. *Reports temp. Finch*, 102. *Caſ. temp. Talbot*, 64. 3 *Wilſ.* 356. Here, 200*l.* was actually and *bonâ fide* paid, and the receipt of it acknowledged in the deed. There is no pretence to ſay that any indirect means were uſed to obtain this ſubſequent ſurrender. The party was *ſui juris*, and he has even covenanted for further aſſurance. Had the conſideration been merely *colourable* or *nominal* only, as 5*s.* I admit it would have been bad. But it is a valuable conſideration *bonâ fide* paid by one party and received by the other, and therefore clearly protected by the ſtatute againſt the prior voluntary ſettlement.

Lord *Mansfield.*—The ſtatute does not ſay a *voluntary* ſettlement ſhall be void, but that a *fraudulent* ſettlement ſhall be void. There is no part of the act of parliament, which affects voluntary ſettlements *eo nomine*, unleſs they are fraudulent. To be ſure, it is very difficult againſt fair honeſt creditors to ſupport a voluntary ſettlement. It is laid down in a caſe by *Hale* that a voluntary ſettlement may be good. And the caſes cited from *Talbot* and *Wilſon* ſupport that doctrine:—I remember a caſe before Lord *Hardwicke*, where a woman who was poſſeſſed of an eſtate, and having children by a former huſband, was about to marry again. But before ſhe married, and becauſe ſhe was going to marry, ſhe made a voluntary ſettlement of her eſtate upon her children. Her ſecond huſband afterwards perſuaded her to join in a ſale of this eſtate for a valuable conſideration; and the queſtion was, Whether the ſettlement was void? The court held, that her doing a rational act without any intention or view of defeating any body, would not render the ſettlement fraudulent, though it was abſolutely voluntary. The

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name of this case was *Newstead* versus *Searle*. I remember another cause before Sir *Thomas Clarke* who sat for the Chancellor, where the question was, Whether a voluntary settlement should be considered as fraudulent?

Mr. *Norton* for the defendant, submitted *four points* to the consideration of the court; alledging that if he was right in *any one* of the four, the defendant would be entitled to retain the verdict. *First*, That the copyholds not being within the mischief intended to be remedied by the act, were not comprehended under the general words "lands and tenements" used in the stat. 27 *El. c.* 4. *Secondly*, that the surrender in favour of the defendant *Routledge*, though made from the consideration of natural love and affection only, was not fraudulent, and therefore void, as against the lessor of the plaintiff. *Thirdly*, That if it was void, at the commencement, it became good afterwards from its being the principal motive and inducement to *Hannah Bell*'s marriage with the defendant. And *fourthly*, on which point he principally relied, that the *second* surrender in favour of the lessor of the plaintiff, was itself *fraudulent* and void, the surrenderee having had notice of the former surrender, and paying no more than 200 *l.* for the premises, when their real and known value was 2000 *l.* In support of the 1st point, he cited 3 *Co.* 9. *a.* on the construction of stat. 13 *Ed.* 1. which gives an *elegit*, and was adjudged not to extend to copyholds. *Cro. Car.* 44. on the stat. 27 *H.* 8. which transfers the possession to the use. *Lut.* 1190. on the stat. 12 *Car.* 2. 24. which enables a father to dispose of the guardianship of his son; and *Buller's Ni. Pri. p.* 108.—Of the second point, 2 *Vern.* 44.—Of the third, *Douglas* and *Ward*, *Chan. Cases*, 100. 1 *Lev.* 150. 1 *Sid.* 134. *Eq. Rep.* 37. *Pre. Ch.* 275. And of the fourth point, 3 *Co.* 83. *b.* *Cro. Eliz.* 445. 3 *Co.* 77. 1 *Bur. Rep.* 396. And upon these authorities prayed the court to give judgment for the defendant.

Lord MANSFIELD, after stating the case, delivered his opinion as follows: The question reserved upon the special case is, "Whether the plaintiffs are entitled to recover?"

In the argument of this case, *four* questions have arisen. The first, "Whether the stat. 27 *El. c.* 4. extends to copyhold "estates?" If it does, then *secondly*, "Whether the first deed, of "1763, is, under all the circumstances of this case, a *fraudulent* co- "*vinous* deed within the true intent and meaning of the statute?" If it is, then the *third* question that arises is, "Whether the plaintiff "comes under such a settlement within the meaning of that statute,

"as

" as will entitle him to have the other ſet aſide?" The *fourth* and laſt queſtion, which however was not made at the bar, but " which in my mind may ariſe, is, Whether if the firſt deed can- " not be ſet aſide in *toto* for the benefit of the aſſignees, the bank- " rupt has any right, as againſt the preſent defendant, to be con- " ſidered as an incumbrancer for 200 *l.* the purchaſe money?"

As to the *firſt* queſtion, there is great reaſon to ſay, that the ſtat. 27 *El. c.* 4. does extend to copyhold eſtates: But it is ſtrange that ſuch a point ſhould be firſt agitated at this time: I ſhould rather think it has been taken for granted, that the ſtatute *does extend* to copyhold eſtates; becauſe, in being ſo conſtrued, it can work no prejudice to the Lord; and the object of the ſtatute is to ſuppreſs fraud. But it is not neceſſary abſolutely to determine that queſtion. I will ſuppoſe for the ſake of argument that it does; and ſuppoſing it does, I am ſtill of opinion againſt the plaintiff in this caſe.—The next queſtion then is, Whether the ſettlement of 1763 is, under all the circumſtances of this caſe, *covinous* and *fraudulent* within the true intent and meaning of the ſtat. 27 *El. c.* 4.? Now, in that ſtatute, there is not a word that impeaches *voluntary* ſettlements, merely *as* being *voluntary* ſettlements; but as *fraudulent* and *covinous*. The title of the ſtatute is, " againſt *covinous* and *fraudu-* " *lent* conveyances," where *nominally* one man *paſſes*, and where *nominally* his eſtate is *conveyed*, to another; but where in fact, it is agreed that the grantor ſhall keep it to his own uſe, and ſo to anſwer other purpoſes of fraud.

The *enacting* part conſiders it in the ſame light, and makes an expreſs proviſion againſt ſuch practices, as if they were a *crime*: For it ſays, (*ſect.* 3.) " that all parties, *&c.* to ſuch fraudulent " grants, *&c.* who ſhall attempt to defend the ſame, ſhall *forfeit* " *one year's value of the lands*, &c. ſo purchaſed, and alſo being " lawfully convicted, ſhall *ſuffer ſix months' impriſonment* with- " out, *&c.*" But no perſon making a *voluntary* ſettlement by way of *proviſion for his family*, was ever conſidered in that criminal light. Where a fraudulent uſe is made of a ſettlement, that indeed may be carried back to the time when the fraud commenced.

A cuſtom has prevailed and leant extremely, to conſtrue voluntary ſettlements fraudulent againſt creditors. But if the circumſtances of the tranſaction ſhew it was *not* fraudulent *at the time*, it is not within the meaning of the ſtatutes, though no money was paid. For inſtance, what is generally done in marriage ſettlements. If a father upon the marriage of his

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eldeſt ſon, in a ſettlement upon him, makes remainders to half a dozen younger brothers after the conſideration of the marriage, thoſe remainders are good within the meaning of the ſtatute againſt any claim of creditors. And the reaſon is, becauſe it was a *good* ſettlement *at the time*. A father has a right to give his eſtate to all his children; and therefore may fairly ſay, unleſs you agree to theſe limitations, I will not join. Again, a marriage is had: Suppoſing any relation has money in his hands belonging to the woman; and ſays, "I will not pay the money unleſs "you make a ſettlement."—A ſettlement in conſequence is made. It is a *voluntary* ſettlement; but the court will ſay, it is a *good* conſideration.—Again, the caſe of *Newſtead* v. *Searle* is very ſtrong. There a woman going to marry a ſecond huſband, makes a ſettlement on her children by her firſt huſband. This was a tranſaction very proper at the time, without any intention on her part of defeating it afterwards; but on the contrary, meaning to put the eſtate out of her own power by making the ſettlement. That made it good, though a voluntary ſettlement.

One great circumſtance which ſhould always be attended to in theſe tranſactions is, Whether the perſon was *indebted* at the time he made the ſettlement: If he was, it is a ſtrong badge of fraud. In the preſent caſe it is not expreſsly ſtated, but I take it for granted, that *William Watſon* had no children of his own. He had different nephews. In 1763 he meant to make, and did make, a ſettlement on his nephew by his ſiſter. This was notorious to the whole country; it was entered upon the records of the court, and every body might, and did ſee it. What is the conſequence of it? The nephew gets credit: for it is not a ſecret private tranſaction: And though what happened previous to the marriage cannot be coupled with this caſe, becauſe the knowledge of it cannot be brought home to *William* or *Hugh Watſon*; yet it ſhews that that happened which in general is ſuppoſed to happen from an act of this kind. The party gains credit by it. And if it gave him credit, he might likewiſe get a marriage by it. He appears therefore publickly for ten years together, with the knowledge of his uncle, entitled to the inheritance of his eſtate. There is no allegation that *William Watſon* the uncle owed a farthing at that time, or left a ſingle debt undiſcharged at his death. On what ground then can this *firſt* ſurrender be conſidered or conſtrued, *covinous* or *fraudulent*?—With reſpect to *notice*, in the caſe of creditors, it is not material, whether a ſubſequent purchaſor has notice or not, of a former fraudulent ſettlement: For it has been determined at law, and therefore muſt ſtand, that

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a man's having notice of a former ſettlement which was fraudulent, ſhall not prevent his avoiding it the ſame as if he had been ignorant of it: becauſe if he knew the tranſaction, he knew it was void by law *. But there was no notion at that time, that courts of law, in modern determinations, would have gone ſo far as they have done, in conſtruing voluntary ſettlements fraudulent againſt creditors.

* 5 Co. 60. 3 Co. 83 — *Wood's Conv.* 804.

But in reſpect of *voluntary family ſettlements*, to be ſure, notice varies it much. In the caſe of a latter ſtatute, the *Regiſter Act* †, though it is ſaid there poſitively, "That a regiſtered deed ſhall "take place of an unregiſtered deed," from whence it might be argued, that if a perſon knew of an unregiſtered deed, it ſhould not ſtand againſt him: Equity ſays, if the party knew of the unregiſtered deed, his regiſtered deed ſhall not ſet it aſide: becauſe he has that notice which the act of parliament intended he ſhould have.

† Stat. 7 *Ann c.* 20.

I now come to the conſideration of the *third* queſtion, "Whether the deed of 1773 is ſuch a deed as is entitled to pro-"tection, and ought to ſet the other aſide?" In order to do that it ſhould be a *bonâ fide tranſaction*, and a *fair purchaſe*, in the underſtanding of mankind; or for a *good conſideration*, as a ſettlement upon a marriage, in conſideration of the marriage; and there, ſuch a ſettlement would ſet aſide and take place of a former fraudulent deed. It is not neceſſary that it ſhould be for money: but it muſt be a fair *bonâ fide* tranſaction: if it is colourable only it cannot ſtand.

Now, what are the circumſtances of the ſecond ſettlement in the preſent caſe? Manifeſtly a mere contrivance. The plaintiff had notice of the former ſettlement. *William Watſon* the uncle had changed his mind: What was to be done to ſet the prior deed aſide? A new one was to be made under ſuch circumſtances, and for ſuch a conſideration, as they thought would effectuate the purpoſe. They agree, therefore, that all affection was to be left out; no generoſity to appear or be mentioned: but the plaintiff is, "*at the requeſt of the ſeller*," to agree to give a price which it is to be ſuppoſed fully ſatisfies the ſeller. It is a groſs fraud and no purchaſe at all: The conſideration of 2co *l.* which is to ſupport it as a deed for valuable conſideration, compared with the real value 2000*l.* ſhews it to have been no purchaſe at all; but a *gift*.

Then comes the *fourth* queſtion, which may ariſe in this caſe, "Whether, as againſt the preſent defendant, the aſſignees of the

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"plaintiff *Hugh Watſon* are entitled to be conſidered as incumbran-
"cers for 200*l*?" As to that, moſt undoubtedly, if *William Watſon* himſelf had come to be relieved againſt this ſettlement in 1773, ſaying, it was by colluſion, and a fraud againſt the firſt, he could not be relieved without paying the 200*l*.; and the complete relief would be, to put things juſt in the ſituation they were before. But that is not this caſe; for here the plaintiff comes againſt a third perſon, whoſe eſtate *William Watſon* the vendor could not charge with a farthing: And, moreover, he comes fraudulently, with full notice that the eſtate had been ſettled upon the defendant ten years. There is no colour therefore to ſet up any claim againſt the defendant to this ſum of money.

Mr. Juſtice ASTON.—As to the purchaſe money (the 200*l*.) the aſſignees cannot come againſt the defendant *Routledge*, but they may come upon the aſſets of *William Watſon*.

With reſpect to the ſtatute 27 *El. c.* 4. the caſe in *Finch Rep.* 102. ſeems to me to bring the deed of 1763 within that ſtatute, as being a deed upon good conſideration. But firſt, as to that ſtatute extending to copyholds. There are caſes, where the words "lands tenements and hereditaments," have been conſidered as extending to copyhold eſtates as well as to other lands. The reaſon why they have been conſtrued not to be included in the ſtatute of *Elegit*, 13 *Ed.* 1. the ſtat. 27 *Hen.* 8. and the ſtat. 12 *Car.* 2. *c.* 24. is, becauſe otherwiſe a prejudice would ariſe to the lord, and an alteration of the tenant without his conſent. I ſhould rather think this ſtatute did extend to copyholds, than not. But it is not neceſſary abſolutely to decide that point.

Then, as to the firſt ſettlement being a good one within the meaning of the ſtatute 27 *El. c.* 4. there is no doubt, but when *William Watſon*, the uncle, was admitted to this eſtate, under the firſt ſurrender, which he had taken to himſelf for life, with remainder to his nephew the defendant in 1763; the ſurrender was good: And admittance to his own eſtate for life, was an admittance likewiſe of his nephew in remainder; it was notorious, and gave fair credit to the nephew. A great deal has been ſaid upon the conſtruction of the ſtat. 27 *El. c.* 4. Whether there ſhould be a *full* as well as a *bonâ fide* conſideration? It has been ſaid that a *bonâ fide* conſideration only, is *not* ſufficient—but it is; and the conſideration need *not* be *full*; for a *mortgage* is a good conſideration, though never a full one. The tranſaction in 1763 is a very fair one; but the ſubſequent ſurrender in 1773, from the circumſtances of it, is by no means ſo; for the purchaſe

purchaſe money, which is only 200*l.* is not for the inheritance ſingly, but likewiſe for the eſtate for life of *William Watſon*; and the receipt expreſſes it to be *in full*; whereas it is not ſo; for the value of them both together is found to be at leaſt 2000*l.*

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Mr. Juſtice WILLES ſaid, he was of the ſame opinion, but deſired it might be obſerved, the court gave no abſolute opinion upon the firſt queſtion, "Whether the ſtat. 27 *El. c.* 4. extended "to copyholds?"

ASHHURST, Juſtice, concurred.

Judgment for the defendant.

PUGH, *et uxor*, *verſus* Duke of LEEDS.

Monday, Nov. 28th.

One, under a power reſerved in his marriage ſettlement to leaſe for 21 years in *poſſeſſion*, but *not* in *reverſion*, grants a leaſe to his only daughter for 21 years, to commence *from the day of the date*, Adjudged a good leaſe.—The word "*from*" may mean either *inclusive* or *excluſive*, according to the *context* and *ſubject matter*: And the court will conſtrue it ſo as to *effectuate* the deeds of parties, and not to *deſtroy* them.

THIS was an iſſue to try whether a leaſe made by one *Godolphin Edwards*, to *Elizabeth Pugh* the plaintiff's wife, and only daughter of the ſaid *Godolphin Edwards*, by virtue and in purſuance of a power reſerved to him under his marriage ſettlement, was a good and valid leaſe. The power reſerved was "to leaſe the premiſes for any term or terms of years, not exceed-"ing 21 years *in poſſeſſion*, and *not in reverſion*, remainder or expect-"ancy; reſerving the beſt improved rent, *&c.*" The *habendum* of the leaſe made, was in theſe words: "To hold to the ſaid "*Elizabeth*, her executors, *&c. from the day of the date* of the "ſaid indenture of leaſe for 21 years, *&c.*"—At the trial of the iſſue at the *Summer* Aſſizes, 1777, for the county of *Salop*, ſeveral objections were made to the *form* of the iſſue; but all waved by conſent; and a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following facts: "That *Godolphin Edwards* being ſeiſed and in poſſeſſion, exe-"cuted the leaſe in the iſſue mentioned, and a counterpart "thereof was executed by the leſſee; that the rent of 57*l.* re-"ſerved by the leaſe, was the moſt and beſt improved yearly "rent, that could be reaſonably had for the premiſes: And that "the ſaid leaſe was in every other reſpect made agreeable to the "power reſerved to the ſaid *Godolphin Edwards*, excepting in "the commencement of the term in the ſaid leaſe mentioned." Upon which, the queſtion ſubmitted to the court was, Whether, the ſaid leaſe, being made to commence *from the day of the date* thereof, the ſame is duly executed according to the terms of the above mentioned power?

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Mr. *Jones* for the plaintiff argued, 1ſt. That the power under which the leaſe in queſtion was made, being a power reſerved to the ancient dominion of the inheritance, it ought to receive a liberal conſtruction; more eſpecially, as the execution of it was for a *meritorious* conſideration; *viz.* as a proviſion for an only daughter. The preciſe form therefore need not be purſued; and ſo it was expreſsly held in Lord *Dartington* verſus *Pultney*, *Eaſt.* 15 *Geo.* 3. *B. R.** and the caſes there cited. 2. If ſo, the variance between "from the date" and "from the day of the date," if it could be called a variance at all, was not ſuch as ought to vitiate the leaſe. In common parlance, they are the *ſame* thing; and in *Co. Lit.* 46. *b.* and *Clayton*'s caſe, 5 *Rep.* 1. were expreſsly ſo adjudged. Now it is not diſputed that "from the date" is a good leaſe in poſſeſſion. Beſides, every fair intendment is to be made in favour of a deed for valuable conſideration. The intention of the parties was clearly to make a leaſe *in poſſeſſion*. If the words uſed, therefore, do not *neceſſarily* exclude the day of the date, and create a reverſionary term, the court ought not to put a forced conſtruction upon them. A reverſionary intereſt is an intereſt to commence after an intermediate intervening intereſt, and ſuch alone could have been intended to have been excepted in the preſent power. But there is no interval of intereſt between the end of one day and the beginning of another; the law ſays, there is *no fraction of a day*; and therefore in the caſe of a freehold leaſe, rather than overturn the deed and defeat the intention of the parties, the court will preſume livery was made the laſt moment of the day. 2 *Wilſ.* 165. So here, to effectuate the intention, the court will preſume the leaſe was *made* the *laſt moment* of the day. As to the caſes determined lately in this court, they were determined on the authority of the Counteſs of *Portland*'s caſe in the *Exchequer*; but there the court were equally divided; therefore it ought not to be conſidered as a caſe of any great authority. The true rule to go by is, the *intention of the parties*; and here unqueſtionably the intention was, to make a leaſe *in poſſeſſion*, and therefore, *that* conſtruction ought to prevail.

* *Supra*, 260.

Mr. *T. Cowper*, *contra*, for the defendant, relied on the authorities of *Doe ex dim. Bayntun* verſus *Watton*, *Mich.* 15 *Geo.* 3. † *Doe ex dim. Gearing* v. *Shenton*, *Mich.* 16 *Geo.* 3. *B. R.* as deciſive of the point. That the objection equally applied to chattel leaſes under ſuch powers, as to freehold. That the reaſon why in law a freehold leaſe to commence *in*

† *Supra*, 189.

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futuro is bad, is becauſe the freehold cannot be in abeyance. It was true, the court had ſometimes avoided the objection in the caſe of freehold leaſes, by ſaying, that *till livery*, the freehold *remains* in the *grantor*; therefore, where livery has in fact been made at a future day, the court have adjudged the leaſe good: ſo, where the jury have *preſumed livery* the laſt moment of the day. But theſe caſes prove the objection to be good in general, that in chattel leaſes, the party is bound by the power; in freehold, by the law. If ſo, the preſent leaſe is clearly bad, for the court muſt intend it to be executed the day it bears date, and to take effect immediately; in which caſe, it is clearly a leaſe in reverſion. The authorities of *Co. Lit.* 46. *b.* 1 *Bulſtr.* 177. and 5 *Rep.* 1. are deciſive, that "from the day of the date" is *excluſive*; and if one day might be excepted, twenty or a hundred might; and there is no drawing the line. Therefore this power is ill executed and the leaſe bad.

Lord MANSFIELD.—The caſes that have been determined here, went very much againſt my opinion and that of the court. But they were determined upon the authority of the Counteſs of *Portland*'s caſe, in the *Exchequer*, ſuppoſing the point to have been ſettled by that determination. But I have ſince had occaſion to reconſider the queſtion. I think the ground upon which it went, and the caſes there cited, have been miſtaken. It is very fit that a ſolemn judgment ſhould be given upon a point that has been ſo much confounded.—The court ordered it to ſtand over.

Afterwards, on this day, being the laſt day of the Term, Lord *Mansfield* delivered the opinion of the court, as follows:

This caſe was an iſſue to try, Whether a leaſe made by one *Godolphin Edwards*, bearing date the 10th *October* 1765, was a good or bad leaſe. The caſe went down to trial, and ſeveral objections were raiſed; but they were all given up except one, which was this; that the leaſe was made for 21 years, to commence "*from* the *day* of *the date*." It ariſes on a marriage ſettlement, in the year 1724, by which a power is reſerved to *Godolphin Edwards* to make leaſes, with many reſtrictions and qualifications, and among the reſt the following; "that they "were not to be in reverſion, remainder, or expectancy:" And therefore the queſtion is, "Whether this be a leaſe *in poſſeſſion?*" And it turns upon this: "Whether to commence *from* the "*day* of the *date* in this deed, is to be conſtrued *incluſive*, or *ex*"*cluſive*, of the day it bears date?"

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I will firſt conſider it as ſuppoſing this a *new* queſtion; and that there never had exiſted any litigation concerning it. In that light, the whole will turn upon a point of conſtruction of the particle "*from*." The power requires no preciſe form to deſcribe the commencement of the leaſe; the law requires no *technical* form. All that is required is only enough to ſhew that it is a leaſe in poſſeſſion, and not in reverſion; and therefore, if the words uſed are ſufficient for that purpoſe, the leaſe will be a good and valid leaſe.

In grammatical ſtrictneſs, and in the niceſt propriety of ſpeech that the *Engliſh* language admits of, the ſenſe of the word "*from*" muſt always *depend* upon the *context* and *ſubject matter*, whether it ſhall be conſtrued *incluſive*, or *excluſive* of the *terminus a quo*: and whilſt the gentlemen at the bar were arguing this caſe, a hundred inſtances and more occurred to me, both in verſe and proſe, where it is uſed both incluſively and excluſively. If the parties in the preſent caſe had added the word "incluſive," or "excluſive," the matter would have been very clear. If they had ſaid, "from the day of the date *incluſive*," the term would have commenced immediately; if they had ſaid, "from "the day of the date *excluſive*," it would have commenced the next day.

But let us ſee, whether the context and ſubject matter in this caſe do not ſhew, that the conſtruction here ſhould be *incluſive*, as demonſtrably as if the word "incluſive" had been added. This is a leaſe made under a power; the leaſe refers to the power; and the power requires, that the leaſe ſhould be a leaſe *in poſſeſſion*. The validity of it depends upon its being in poſſeſſion; and it is made as a proviſion for an only daughter. He muſt therefore *intend* to make a *good* leaſe. The expreſſion then, compared with the circumſtances, is as ſtrong in reſpect of what his intention was, as if he had ſaid in expreſs words, "I mean it as a leaſe in poſſeſſion."—"I mean it ſhall be ſo "conſtrued."—If it *is* ſo conſtrued, the word "*from*" muſt be *incluſive*. This conſtruction is to ſupport the deeds of parties, to give effect to their intention, and to protect property. The other is a ſubtlety to overturn property, and to defeat the intention of parties, without anſwering any one good end or purpoſe whatſoever. And though courts of juſtice are ſometimes obliged to decide againſt the convenience, and even againſt the ſeeming right of *private* perſons, yet it is always in favour of ſome greater *public* benefit. But here, to conſtrue "from "the

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"the day of the date" to be *exclusive*, can only be to defeat the intention of the parties. If such a construction were right, it would hold good, supposing the lessee had laid out ever so much money upon the estate; and all would be alike defeated by a mere blunder of the attorney, or his clerk. Therefore, if the case stood clear of every question or decision which has existed, it could not bear a moment's argument.

Secondly, I will consider this question upon the authorities.—I have arranged all the cases that have been determined in *Westminster-hall*, in order of time; and when I come to state them, you will be surprised to see they stand so little in the way, as *binding* authorities against justice, reason, and common sense. All they shew is, the great uncertainty of the meaning, and the impossibility of putting an absolute sense to hold good in all cases; they are themselves so many contradictions backwards and forwards.

The first case in point of time was in *Mich.* 4 *El. Dyer*, 218. *b.* *Moore*, 40. *S. C.* This was a question that arose upon the statute of Inrollments, 27 *H.* 8. *c.* 16; which says, "that "the inrollment shall be made *within six months next after* "*the date of the deed.*" The indenture in question bore *date* the 9th *October* 1557; it was *inrolled* in *Chancery* on the 21*st March* 1558, which was the *last* day of the six months, reckoning 28 days to each month; and making *the day of the date, exclusive*. The court held, "that the indenture was well "inrolled, and that the words "*next after* the *date* of the "deed," were exclusive of the *day* of the *date*." This decision was *in favour* and in support of *the deed*; otherwise it would have been void. And yet it has been determined, that in a note of hand payable ten days *after sight*, the *day* of the *sight* is *inclusive* *. Why? Because of the subject matter; that there should be no further time to make the demand: and yet *after* the *day*, and *after sight*, is precisely the same in language.

* Bellasis v Hester, 1 Ld. Raym. 281. 2 Lutw. 1589. S. C.

The next case is *Clayton*'s case, 5 *Coke*, 1. *Mich.* 27 *El.* The point in question was, the meaning of the words "from "henceforth," which were accounted from the day of the delivery, and as much as to say, "from the *making*:" But the court held, that "from the *making*" was *inclusive*, and "from "the *day* of the *making*" was *exclusive*.

The next is, *Trin.* 39 *Eliz.* 5 *Co.* 90. *Barwick*'s case, which was a demise of a freehold lease by letters patent "*habendum* "*a die confectionis earundum literarum patentium*:" The *day* of the date was held to be *exclusive*, and the letters patent therefore void.

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In *Mich.* 4 *Jac. Cro. Jac.* 135, *Oſborn* v. *Ryder*, "*from the* "*date*," was held to be, *incluſive*; and different from the time, or day of the date, which is excluſive.—In *Trin.* 8 *Jac. Cro. Jac.* 258. *Llewellyn* v. *Williams*, it was held, "that from the date" and "from the day of the date" meant *both* exactly the ſame thing, and *both excluſive* of the day.

The next caſe in order of time is *Trin.* 9 *Jac.* 1 *Bulſ.* 177. the very year afterwards; and there it is ſaid by *Fleming*, that "*from the date*," *includes* the day, and, "from the *day* of *the date*" *excludes* it. Now thus the caſes ſtand, down to the 14th of *James*: They are *yes* and *no*, and a *medium between* them. But in *Trin.* 14 *Jac.* 1 *Rolle's Rep.* 387. 3 *Bulſt.* 204. *S. C. Coke*, Chief Juſtice, and the whole court, in the caſe of *Bacon* verſus *Waller*, held, agreeably to *Llewellyn's* caſe, *Trin.* 8 *Jac.* that "from "the date," and "from the day of the date," meant *both* exactly the *ſame* thing, and *both* were *excluſive*.

Thus it ſtood then for *ſettled* law by theſe two *ſolemnly adjudged caſes*, that *both* meant *exactly the ſame thing*. So it ſtood likewiſe at the time of the publication of *Coke's Commentary on Littleton*, which was about ten years afterwards; and ſo clear was Lord *Coke*, in his opinion, that the point was ſettled by thoſe two judgments, that he adopts the judgment in poſitive words without reſtriction or qualification; and in *Co. Lit.* 46. *b.* he lays it down as text law, that *both* mean the *ſame* thing, and that both are *excluſive*. So it ſeems to have ſtood down to *Trin.* 24 *Car.* 1.—At that time mankind began to revolt at ſuch a doctrine. There, in the caſe of *Corniſh* v. *Cawſay*, *Aleyn*, 77. *Stile* 118. *S. C.* in an action of debt againſt an executrix, the plaintiff declared upon a leaſe, "from the day of the date" for ſeven years. The leaſe was in theſe words: "*From the day of the* "*date*" for the term of ſeven years, from *henceforth next* and *immediately following*, with a great many other words. It was contended, that though "*from the day of the date*" was *excluſive*, yet the words, "from henceforth, *&c.*" being added, made it *incluſive*: and this was objected as a variance between the declaration and the deed. The court left it to the jury: The jury threw it back upon the court, and brought in a ſpecial verdict ſtating the leaſe *verbatim*: And then the court held, that according to the authorities, "*from the day of the date*" was *excluſive*; and therefore, the plaintiff had miſtaken his leaſe. But at the ſame time they ſeemed ſhocked at its being ſo: For ſay the court, "if there was a queſtion upon letters patent

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" like *Barwick*'s caſe, to make the patent good, the jury might " find they were made the laſt inſtant of the day." This they obſerved to get rid of the force of a wrong determination. Juſt ſo Sir *Eardly Wilmot* once did, in a caſe that came before him. He left it to the jury to find that livery was made the laſt moment of the day.—The authorities therefore of *Coke Littleton*, 46. *b.* *Bacon* v. *Waller* *, and *Llewellyn* v. *Williams* †, were at that time grumbled at, as being againſt the ſenſe of mankind, againſt convenience and againſt juſtice; and founded upon ſubtleties that even the ſchoolmen would have been aſhamed of. The doctrine they eſtabliſhed was, that *both* meant the *ſame* thing, and *both* were *excluſive*. With reſpect to their *both* meaning the *ſame* thing, unqueſtionably they were right. For what is " the date?" The date is a memorandum of the *day* when the deed was delivered: In *Latin* it is " *datum:*" and " *datum* " *tali die*" is, *delivered on ſuch a day.* Then in point of law, there is no fraction of a day: It is an indiviſible point. What is " the *day* of the date?" It is " *the day the deed is delivered.*" " The date," therefore, being alſo defined to be the day the deed is delivered; " the date" and " the day of the date" muſt be the *ſame* thing. The *day* of the date, is only a ſuperfluous expreſſion. It is impoſſible in common ſenſe to diſtinguiſh the one from the other. " Date" does not mean the *hour* or the *minute*, but the *day* of delivery: And in law there is no fraction of a day. —As to the other point, that " from" ſhall in all caſes be conſtrued to be *excluſive*, it is contrary to the common ſignification of language: And for courts of juſtice to determine words againſt the intention of parties, and againſt the generally received ſenſe and acceptation of the words themſelves, is laying a ſnare to entrap mankind. Uſage decides upon the force of language; and with reſpect to this word, has imprinted on the underſtandings of men in general, in their tranſactions in life, the ſenſe that I now put upon it: Whilſt courts of law underſtand it in a totally different ſenſe.

* 3 *Bulſt.* 204. 1 *Rol. Rep.* 387. *S. C.*

† *Cro. Jac.* 258.

Thus it ſtood down to the 6th year of *William* and *Mary*. A caſe then happened of conſiderable property, and not merely a queſtion of pleading‡. It aroſe upon a prebendal leaſe to commence, *from the date* of the indenture. The ſucceſſor wiſhed to avoid it on the ground of its being a leaſe to commence *in futuro*. The caſe was ſeveral times argued; *againſt* the leaſe, upon the weight of authorities; and in *favour* of it, upon the ground of the intention of the parties, " *ut res magis valeat*

‡ *Hatter* v. *Aſh*, 3 *Lev.* 438. 1 *Ld. Raym.* 84. *S. C.*

" *quam*

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"*quam pereat.*". After ſeveral arguments, *Treby*, Chief Juſtice, at firſt, from the ſtrength of reaſon, was for ſupporting the leaſe; and then, ſtaggered by the weight of authorities, changed his opinion: But when the judgment was given, he abſented himſelf. *Powell* junior, at firſt followed the authorities; but afterwards came over to reaſon; and at laſt it was agreed, by *Neville* and the two *Powells*, that "from the date" ought to be conſtrued *incluſive*, and therefore, that the leaſe was good. Now tho' there was ſomething ſaid in the argument as to the diſtinction between the date, and the day of the date, the authorities ſaid they were the *ſame*; and yet this determination went to the matter of right in the queſtion and ſupported the leaſe.

The next caſe after this was *Trin.* 11 *Wm.* 3. 1 Lord *Raym.* 480. It was upon a policy of inſurance dated the 3d *September* 1697, upon the life of Sir *Robert Howard*, for a year, "from "the day of the date" of the policy. Sir *Robert* died upon the 3d of *September* 1698, at one o'clock in the morning: And *Holt* Chief Juſtice held, that *from the day of the date* was *excluſive*: But he held, that the inſurer was liable, becauſe in law there is no fraction of a day; and Sir *Robert* died at one o'clock in the morning, whereas to vacate the policy he ſhould have lived till twelve o'clock at night. In that caſe there was no argument to be drawn from the *ſubject matter*; for in the policy it was totally indifferent when it ſhould begin: The argument rather was, that it ſhould begin the day after. In the next place it would have included the inſurance if it had begun that day. Lord Chief Juſtice *Holt* ſeems to have conſidered it as a favourable caſe for the inſured; otherwiſe he would not have had recourſe to the old maxim of law, that there is *no fraction* of a *day*. He cited a caſe * where it was held, that if a man lived to the eve of the anniverſary of his birth, no longer even than till one o'clock in the morning of that day, and made his will, by having touched the verge of the day, it was the ſame as if he had compleated the whole day; and the will was declared a good one. *That* exiſted as law; but *Holt* in his application of it turned it the other way. I look upon this caſe as of very little authority; there being no argument from the *ſubject matter*.

* 1 *Salk.* 44. *Anon.*

Another caſe happened ſince, in *Hil.* 4 *Ann. Seignorett* verſus *Noguire*—2 Ld. *Raym.* 1241. This caſe, though a very material caſe, was not cited in the *Exchequer*, the preſent point not being the queſtion litigated, but ariſing out of ſome collateral matter;

matter; and therefore the indexes have not led counsel to it. It was upon a point of pleading; and the whole court held, that to aver that a contract was to commence "*with* the day "of the date," was the same thing as to aver that it commenced "*from* the day of the date." *Holt*, Chief Justice said, that "from "the date" was *inclusive*; and so, was the *same* as "*with* the "date," but that "from the *day* of the date" was *exclusive*." But *Powell* said, that "from the date," and "from the day of "the date," had been adjudged to be the same in the *Common Pleas*. That case in the *Common Pleas* is not to be found. It could not be the case of *Hatter* v. *Ash*. But all the court determined, that "*from* the *day* of the date" was the same as *with* the day of the date, and *inclusive*. If "from the *date*" therefore is *inclusive*, it must be the same as "from the *day* of the date." I have been supplied with another case this morning by Mr. Justice *Aston*: The name of it is *Thompson* v. *Vanbeek*, before Lord *Hardwicke* in *Mich.* 1736. It was an action brought upon an usurious contract, and the question turned upon a point of pleading. The rule laid down by Lord *Hardwicke* in that case shews that he went upon the same principle, and reasoned just as I do now; that "the construction must always depend upon "the subject matter."

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N. B. Here, Mr. Justice *Aston* stated this case from his own note as follows: *Thompson* versus *Vanbeek* was never determined; but as it stood the case was this: It was an action on the statute of usury. The declaration said "giving day of payment "*from* the 26th." Upon the evidence it appeared, that the bond was given on the 27th. The question was, Whether, as the declaration stated "giving day of payment *from* the 26th," this was a variance? That depended upon whether the word "*from*" should be construed *inclusive* of the 26th, or *exclusive*. What Lord *Hardwicke* said was this: "The computation is to be made from "the time of the act done;" and though there are a variety of constructions of the word "*from*," yet it depends entirely upon the *nature of the thing*; and that it should so depend is the right rule. The consideration for the interest paid, is giving day of payment. I think it *includes* the day; and my reason is, that it would be a strange construction to say, that the day of payment shall be antecedent to the time of advancing the money; so *ut res magis valeat quam pereat*, it is *inclusive*. But the case was never decided.

Thus stood all the authorities down to the year 1743; a period of two hundred years; not much to the honour of the learned in *Westminster-hall*, to embarrass a point which a plain

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plain man of common ſenſe and underſtanding would have no difficulty in conſtruing.

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There then happened a caſe of great litigation in the *Exchequer*, which aroſe thus: Lord *Pembroke* had got a leaſe from the crown, of a ſpot of ground in *Privy Garden*, and had built a houſe upon it at a great expence. The Counteſs of *Portland* had alſo a leaſe of an adjoining ſpot, and had built her houſe next to Lord *Pembroke*'s. There was another houſe belonging to the Ducheſs of *Portland*, adjoining Lady *Portland*'s; all three held under the crown. Between the three houſes and the river *Thames*, there was a terrace, which had been part of the Queen's garden. Neither of them thought of applying for the terrace; and it would have been thought invidious to have done ſo. It was to be in common.—Upon the circumſtance of this terrace, Lord *Pembroke* laid out a conſiderable ſum of money upon his houſe. At the expiration, however, of her leaſe, the Counteſs of *Portland* applied to renew; a new leaſe of fifty years was granted, in which, without notice to Lord *Pembroke*, ſhe got the terrace inſerted and added. When Lord *Pembroke* heard of it he was much offended; but ſtill more ſo at the uſe that was made of it; for the Counteſs planted trees, which if they had grown up would have intercepted Lord *Pembroke's* view; however ſome fatality attended them, for they all died after a certain time. Lord *Pembroke* wanted to avoid this leaſe; not to take away Lady *Portland*'s houſe, but to get back the terrace, and leave it in the ſtate it was before. Application was accordingly made to the officers of the crown about it; and at laſt the Attorney General was directed to file an information for the terrace; and an information was accordingly filed in the *Exchequer*. A variety of objections were made to different flaws, ſuppoſed in the leaſe; but the principal objection was founded upon the civil liſt act, 1 *Ann. ſt.* 1. *c.* 7. which directs, that all leaſes to be granted of any of the crown lands ſhall be void, "unleſs made to commence "*from the date or making.*" This leaſe was made to commence "from the *day of the date* or making." Upon this it was argued for the crown, "that the *date*, and the *day* of the making "were *incluſive*, and that the act of parliament had expreſsly "declared the leaſe ſhould be in thoſe terms; but, that *from the* "*day of the date* was *excluſive*; and therefore, the leaſe was void "for the variance." On the part of the Counteſs it was contended, that "from the date," and "from the day of the date," were both the ſame. Upon the argument, all the caſes were cited that have been now cited, except the two I have mentioned.

Sir

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Sir *Thomas Parker* and Mr. Baron *Reynolds* were of opinion, with the objection, that it was a void leaſe, becauſe it commenced *in futuro*. The two other Barons were of a different opinion upon this point; but upon another point, they were of opinion the leaſe was void. Sir *Thomas Parker* and Mr. Baron *Reynolds* to the contrary; ſo that, for different reaſons, they were all of opinion the leaſe was *void*. Upon a caſe which happened in this court ſince *, this caſe between Lord *Pembroke* and the Counteſs of *Portland* was mentioned. Upon memory, as the judgment appeared to me in ſo unfavourable a light, I took it for granted, that the court had been as it were compelled by the weight and force of authorities. But now I will tell you why I change my opinion, after having determined the caſe of *Doe* verſus *Watton*, as I then did, out of a great veneration for Sir *Thomas Parker*, and becauſe I did not care to ſet up an opinion of my own mind againſt a ſolemn judgment. Sir *Thomas Parker* intending to favour the world with the publication of ſome caſes that were adjudged in his time, he did me the honour to deſire I would peruſe them. I have done ſo; and reading a very elaborate report of the Counteſs of *Portland*'s caſe, brought back to me, in a regular view, the whole doctrine upon the preſent ſubject. There I ſaw how the authorities ſtood; how the reaſoning ſtood; and I likewiſe found another thing mentioned in that caſe, which ſeems to me not to have been properly argued at the bar by the counſel in ſupport of the leaſe. It is this: The parties concerned had ſearched all the leaſes from the time of the civil liſt act, down to the moment of that, upon which the queſtion was then in agitation; and they were nearly half the one way and half the other; eighty were granted "from "the date or making," and above ſeventy "from the day of the "date or making." All theſe leaſes had paſſed the great ſeal, and likewiſe the ſeal of the *Exchequer*. The argument drawn from this circumſtance was, that uſage ſhould get the better and prevail over the act of parliament; which was in fact an admiſſion at the ſame time by implication, that "from the day of "the date" was contrary to the act. It ſtruck me in a different light; which is, that the queſtion turned upon the conſtruction of the *Engliſh* words, and what ſenſe they bore. If I was right, nothing can be ſo ſtrong as that all the officers of the crown who had been concerned in making theſe leaſes looked upon the words as ſynonimous, and ſuffered them to paſs and repaſs unnoticed. It is demonſtration, that by uſing *both indifferently*, they underſtood them to be *both* the *ſame thing*.

* Doe *ex dim.* Bayntun *v.* Watton, *ſupra*, 189.

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I mentioned this to Sir *Thomas Parker*, and found my opinion ſupported by Sir *Eardly Wilmot*. Sir *Thomas Parker*, with that candour which always accompanies great abilities, gave ſo far way to it, that he had doubts upon the determination: He therefore ſuppreſſed the report of, The Attorney General *verſus* the Counteſs of *Portland*. And I would not have produced it upon this occaſion, but that he has given me leave to mention his name as approving of the preſent determination: This relieves me from the difficulty I ſhould have had in differing from his authority.

To conclude: The ground of the opinion and judgment which I now deliver is, that "*from*" may in the vulgar uſe, and even in the ſtrict propriety of language, mean either *incluſive* or *excluſive*: That the parties neceſſarily underſtood and uſed it in that ſenſe which made their deed effectual: That courts of juſtice are to conſtrue the words of parties ſo as to effectuate their deeds, and not to deſtroy them; more eſpecially where the words themſelves abſtractedly may admit of either meaning.

If there were nothing more in the queſtion, than that all the law officers concerned, had, in the abovementioned caſes, conſidered the two expreſſions as ſynonimous; that would be ſufficient to guide my opinion. Therefore let there be judgment for the plaintiff.

I ſhould ſay further, that inſtantly, upon what paſſed between Sir *Thomas Parker* and myſelf, I acquainted ſome of the counſel at the bar that there was a change of opinion, as to the authority of the caſe in the *Exchequer*.

THE END OF MICHAELMAS TERM.

HILARY TERM

18 GEORGE III. *B. R.* 1778.

REX *verſus* BENJAMIN CHOLSEY.

Monday, Jan. 26th.

THE defendant had been convicted of groſs perjury, before a committee of the Houſe of Commons, ſitting upon the *Hindon* election; and when brought up for judgment in this court, was ſentenced to be ſet in the pillory at *Hindon*. A rule was thereupon made upon the marſhal to carry him down to *Hindon*, and upon the ſheriff of *Wilts*, to ſet him in the pillory. The tipſtaff accordingly carried the defendant down; and having done ſo, applied to Mr. *Beckford*, the proſecutor, to be repaid his expences, and alſo for a compenſation for his trouble; the whole demand amounting to five guineas, which Mr. *Beckford* refuſed to pay. A rule was therefore moved for and made upon him, "to ſhew cauſe why he ſhould not forthwith pay "the ſaid *Holloway*, the tipſtaff, his ſaid expences, *&c.*"

If an offender convicted in *B. R.* receive ſentence to be *ſet on the pillory* in a *different* county; the *proſecutor* is not *bound* to pay the tipſtaff any *fee* or even the *neceſſary expences* of carrying ſuch offender thither.

Mr. *Dunning* now ſhewed cauſe, and inſiſted that the proſecutor was in no reſpect liable to this charge. That the proper mode was for the marſhal to receive the amount of the expences actually incurred, and the fee for the tipſtaff's trouble, if he were entitled to any, from the ſheriff of the county to which the defendant had been carried, and for the ſheriff to reimburſe himſelf by charging the whole to the county.

Mr. *Wallace*, *contra*, in ſupport of the rule, ſaid, it had always been the conſtant practice, where perſons were pilloried in *Middleſex*, for the proſecutor to bear all the charges attending the execution of the ſentence; and there could be no reaſon therefore why the proſecutor ſhould not in like manner defray the expences in this caſe.

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The court were very clear that this charge could not be brought into the ſheriff's account and allowed upon his cravings, as the expences of erecting the pillory, ſetting the criminal upon it, and ſuch like expences diſburſed by the ſheriff himſelf, on his own account, are; and ſaid, whatever the private practice of proſecutors might be, the caſe happened ſo ſeldom that no uſage or cuſtom could have obtained in it; and therefore, as there was no *eſtabliſhed* fee or adjudged precedent in ſupport of ſuch a demand, they could not interfere to enforce the payment by a rule of court. But recommended it to the proſecutor to pay the money.—Mr. *Dunning* ſaid, his client, Mr. *Beckford*, would have no objection, when it was no longer demanded as a right.

PRICE *verſus* FLETCHER *et al.*

Same day.

Covenant. Practice.

IN this caſe, which was an action againſt the executors of Sir *John Aſtley*, for breach of covenant, for quiet enjoyment under a leaſe, the declaration ſet out the whole leaſe *verbatim*. Mr. *Bower* therefore moved that it might be referred to the Maſter to ſtrike out the ſuperfluous matter in the declaration with coſts, agreeably to the rule laid down by the court, laſt term, in the caſe of *Dundoſs* v. Lord *Weymouth*, *ſupra*, 665. The court ordered it to be referred to the Maſter; and Lord *Mansfield* ſaid, "the next inſtance of the kind that came before "the court, he would enquire who drew the declaration."

COOK *verſus* JONES.

Tueſday, Jan. 27th.

Upon a rule *niſi* to vacate a *judgment confeſſed*, and to ſtay the proceedings on the *ſcire facias*, upon an alſegation that the conſideration upon which the warrant of attorney had been obtained, was uſurious, the court will direct an iſſue to try the uſury, and enlarge the rule in the mean time.

THIS came before the court upon a rule to ſhew cauſe why the judgment entered up on a warrant of attorney, given by the defendant in this caſe, ſhould not be ſet aſide, and why the proceedings on the *ſcire facias* ſhould not be ſtaid, upon this ground; that the conſideration upon which the warrant of attorney had been obtained, was corrupt and uſurious.

Mr. *Mansfield* againſt the rule.—This court will not interpoſe unleſs where the plaintiff would otherwiſe be entitled to ſue out execution immediately. But here, the time being elapſed, no execution can iſſue till after judgment had upon the *ſcire facias*; to which, if warranted in fact, the defendant may in the mean time plead the uſurious contract in bar.

Lord

Lord MANSFIELD.—The defendant can plead nothing in bar of the *ſcire facias*, which he might have pleaded to the original action. The judgment in this caſe is a judgment confeſſed on a warrant of attorney: ſo that the party had no opportunity of pleading, and is without relief unleſs the court interpoſes *.

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* See 2 *Str.* 1043. *Caſ. temp. Hard.* 233. *Cro. Eliz.* 588 2 *Sid.* 182.

The court ordered the rule to be enlarged, and an iſſue was directed to try, Whether the contract upon which the warrant of attorney was given, was uſurious.

REX *verſus* JOHN HALE.

Saturday, Jan. 31ſt.

THE defendant had been convicted in *treble the value* of 520 lb. weight of *tea*, upon an information exhibited before two juſtices of peace, ſetting forth "that the ſaid tea had been ſeized as forfeited, *for unlawful importation*, together with the packages, *&c.* and alſo a *cart* and *two horſes* uſed in removing the ſame, *&c.*" for that "he the ſaid *John Hale* did *knowingly harbour*, keep and conceal, and *permit* and ſuffer to be *knowingly* harboured, kept and concealed, the ſaid tea, *&c.* "ſo unlawfully imported, contrary to the form of the ſtatute, "*&c.* †"—The cart and horſes, and the tea, were alſo by the ſame conviction adjudged to be forfeited; but the penalty of *treble* the value of the tea, which amounted to 681 *l.* 7 *s.* 6 *d.* was mitigated to 190 *l.*

† 11 *Geo.* 1. *c.* 30. *ſ.* 18.

Upon the conviction being removed into this court by writ of *certiorari*, a rule was obtained to ſhew cauſe why the ſame ſhould not be quaſhed, the juſtices having improperly proceeded to convict the defendant in *treble the value of the tea*, for *knowingly harbouring*, &c. without ſufficient evidence to warrant them in ſo doing.—And now, upon ſhewing cauſe, the evidence appeared to be, "that the witneſſes, in a field, about a quarter of a mile from the defendant's houſe, and which field they all ſwore they believed to be in the defendant's occupation, ſaw two of *his* ſervants loading the tea in queſtion, into a cart with two horſes, which one of the witneſſes likewiſe ſwore were the *defendant's*. Another witneſs ſwore, that in a converſation with the defendant, he ſaid "it was unfortunate for him, that his ſervants had taken his cart and horſes without his knowlege;"—The defendant, upon being called upon to anſwer the charge, declared "*he knew nothing of his ſervants having the tea;*" but did not produce either of the ſaid two ſervants who were concerned

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in loading the ſaid tea into the cart, or any other evidence whatſoever in proof thereof; nor did he prove that the duties chargeable upon the ſaid tea, had been ever paid or ſecured, as by law they ought to have been.

Upon ſhewing cauſe againſt the above rule, ſo much of the conviction as related to the penalty of *treble the value* of the tea, was *quaſhed*; but the reſt, as to the condemnation of the tea and the cart and horſes, was adjudged good.

N. B. It ſeemed to be the opinion of Mr. *Davenport*, who was of counſel for the defendant, that a conviction could not be adjudged bad in part, and good for the reſt. But for the benefit of his client, he conſented to this mode of accommodating the diſpute; and a rule was according made as above.

Same day.

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An action will not lie upon a *voluntary wager* between two *indifferent perſons*, upon the *ſex* of a *third*, apparently a *man*; having acted, and continuing to act, as ſuch, in various public characters.

1. Becauſe ſuch enquiry tends, to *indecent evidence*.

2. Becauſe it tends *to diſturb the peace of the individual*, and *of ſociety*.—But *indecency of evidence* is no *objection* to it's being received, where it is *neceſſary* to the *deciſion* of a *civil* or *criminal right*.

THIS was an action of *aſſumpſit*, upon a wager between the plaintiff and the defendant, upon the ſex of *Monſieur Le Chevalier D'Eon*; and who was ſo deſcribed in the declaration, which ſtated, that the defendant on the 4th of *October* 1771, in conſideration that the plaintiff would then and there pay him *ſeventy-five guineas*, undertook to pay to the plaintiff *three hundred pounds*, *in caſe* the *Chevalier* ſhould *at any time* prove to be a *female*.

There were other general counts for money lent, money laid out and expended for the uſe of the defendant, and money had and received by the defendant to the uſe of the plaintiff. Plea, *Non aſſumpſit*.—The cauſe was tried before Lord *Mansfield* at *Guildhall*, at the ſittings after *Michaelmas* Term, 1777, when the jury found a verdict for the plaintiff, damages 300 *l.* coſts 40 *s.*—Mr. *Bearcroft*, of counſel for the defendant, had moved on the ſecond day of this term to *arreſt the judgment*; and if he ſhould not ſucceed in that, then that the defendant might be at liberty to *ſtay the proceedings*; and obtained a rule to ſhew cauſe. This motion was grounded upon an objection he took at the trial, that the plaintiff ought not to recover, becauſe it was a wager upon a queſtion tending to introduce indecent evidence. To this it was anſwered, that the objection, if founded at all, *appeared upon the record*; and Lord *Mansfield* being of that opinion, the objection was then over-ruled. Afterwards, on *Tueſday* the 27th of *January*, in this term, Lord *Mansfield* mentioned this caſe, and applying to Mr. *Bearcroft*, ſaid, he underſtood

stood his *only* objection was, that the question led to indecent evidence. But his Lordship added, "there is another ground, "which does not appear so strong upon the record as upon the "evidence; which is, that it materially affects the interest of a "third person. If I am right in that objection, the plaintiff ought "to have been nonsuited. Therefore I mention it, that you may "move for a new trial at the same time, and so take in the whole "of the question."—This addition was accordingly made to the rule. 1778. DA COSTA *versus* JONES.

Mr. *Wallace*, Mr. *Buller*, and Mr. *Dunning* now shewed cause, and argued, that by the law of *England*, wagers upon every possible subject are lawful; such only accepted, as are specially prohibited by positive statute: *viz.* wagering policies upon ships, *&c.* interest or no interest, and such as are made void by the statutes against gaming. But even these were lawful antecedent to the statutes that restrain them. Every other subject therefore, remains open to this species of contract, as it did at common law. And there, whether the parties were interested or not, was totally immaterial. But if it were material in this case, the parties certainly were interested from the moment of subscribing to the policy. Any objection, however, to the legality of a wager is idle, when it is considered, that even courts of justice have adopted it as a form of legal proceeding, and try all feigned issues in that shape. The single question therefore, is, Whether the *sex* of a person is an *improper* subject of a wager? And 1st, As to the objection, that it *tends* to introduce *indecent evidence:* No doubt, many such wagers have existed. Insurances upon the sex of *children unborn*, are frequent. Master *Holford*'s policy upon Lady *Lade*'s child, if it had been brought to trial, would equally have led to indecent evidence; But no one ever thought it void, or objectionable on that account. In *pedigrees*, it is not uncommon for the same sort of evidence to arise. Suppose a wager, whether a particular act was done by a *man* or a *woman*; or a *life insurance*, with an exception as to a *particular disease*: the discussion of these, and many other subjects might involve the greatest indecency. But courts of justice do not reject the contracts of parties, because the subject matter of them happens to be indecent or indecorous. What can be a greater violation of all decorum, than for two sons to run their fathers' lives against each other: And yet the case of the Earl of *March* v. *Pigot*, *Trin.* 11 *Geo.* 3.* was entertained, and solemnly adjudged in this court, in favour of the contract, without

* Since reported, 5 *Burr.* 2,802.

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a thought or idea of its being liable to any ſuch objection. In the caſe of *Jones* v. *Randall*, *Hil.* 14 *Geo.* 3. *B. R.* * which was a wager upon the event of a ſuit then depending, and part heard before the Houſe of Lords, the objection of its being *contra bonos mores* applied in the ſtrongeſt manner poſſible; becauſe the eſſential requiſite to the validity of a wager, namely, that there ſhould be an equal chance of winning or loſing, could only exiſt in that caſe upon the ſuppoſition, that the houſe were ſo ignorant as not to know the law, or, knowing it, were ſo profligate as to decide contrary to law, But the court were clear in over-ruling the objection, and confirmed the contract. Here, however, the objection is not even warranted by the fact. For the ſubject matter was not only *capable* of being proved, but *has been* proved in three ſucceſſive trials, *without* indecent evidence. The time to have objected would have been, when any ſuch evidence appeared; not becauſe it poſſibly *might* appear. There is nothing therefore in this objection; and if there were, it is in this caſe premature. 2dly, As to the poſſibility of its *affecting the intereſt of a third perſon*; that objection, perhaps, may hold, where the proceedings are merely fictitious or colluſive, and where they are ſet on foot for no other purpoſe than to injure a third perſon who is innocent; as in *Muilman*'s caſe †. But the ground upon which the court interferes in ſuch a caſe is, that the proceedings are a *contempt* of the court; and therefore, at the inſtance of the party liable to be injured, the court will ſtay them and puniſh the contempt. So, if this had been a mere contrivance to affect an innocent perſon, the court might have conſidered it as a contempt. But the caſes are totally different. This is a fair *bonâ fide* wager, made no leſs than *ten* years ago, without the ſmalleſt intention of affecting the *Chevalier D'Eon* in the ſlighteſt degree. The ſilence of the parties till this time, clearly ſhews *that*: And even now, the action would not have been brought to trial, but for the evidence furniſhed by the *Chevalier* herſelf in her diſpute with *Demorand*. But in what manner can it affect her? There is nothing criminal in having aſſumed the habit or the form and character of a man, and having fought the battles of her country or ſerved it as a miniſter of ſtate. But if it is criminal, the conſequences ariſing from it are the effect of her own conduct. She has impoſed upon the world by aſſuming a character that did not belong to her; and therefore ought not to be protected in con-

* *Supra*, 37.

† Reported in Caſes *temp. Hardwicke*, 237.

tinuing

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timuing the cheat. So that, either way, the objection falls to the ground. And if the *Chevalier* could not avail herſelf of it, *a fortiori* the defendant, who is an indifferent perſon, cannot. But is it not every day's practice for *third* perſons to be affected, and very materially ſo, by trials in the common and ordinary courſe of juſtice? What could be more painful to a father, than to have a wager upon his own life laid by his ſon, publicly canvaſſed and diſcuſſed in a court of juſtice? A wager was lately tried upon the place of nativity of the Ducheſs of *Hamilton* and her ſiſter, whether it was in *England* or *Ireland*; which produced an enquiry that aſcertained their ages: A very ſerious inconvenience probably to them, but it would have been no ground for ſtaying the regular proceedings of a court of juſtice. But here the objection itſelf fails, becauſe all the public characters which the *Chevalier* has filled, are paſt. As there is no ſubſtantial objection therefore, either upon principle or authority, nor any founded in fact, to bar the plaintiff's right of action in this caſe, the verdict ought to ſtand, and the rule be diſcharged.

Mr. *Bearcroft* and Mr. *T. Cowper*, *contra*, in ſupport of the rule.—There is ſufficient foundation for ſtaying the proceedings upon both objections; and the ground is this: that to permit ſuch a wager to be diſcuſſed in a court of juſtice, is *contra bonos mores*. 1. It tends to introduce indecent evidence, where it is not neceſſary for the purpoſe either of civil or criminal juſtice, upon a queſtion in which the parties have no intereſt whatever but of their own creating. 2. It tends to violate the peace of ſociety by exhibiting a *third* perſon, who is innocent, in a ridiculous and contemptible light to all the world, and to break in upon his private comfort and peace of mind. Wagers of this kind are in themſelves a national diſgrace. Ought it to be endured in any country, that two perſons ſhall lay a wager upon an indecent ſubject, and then call upon the higheſt court of juſtice in the kingdom to determine ſo improper a queſtion? To obviate this objection it has been ſaid, that in point of fact no indecent evidence was given in this caſe: But that is not ſtrictly ſo. The trial certainly was, and in the nature of it could not but be, indecent. And it is upon *that* the objection turns: Not, Whether the language of the witneſſes, or the mode of conducting the trial, was indecent; but, Whether the nature of the ſubject was ſuch, that the moſt guarded caution and warineſs in the mode of expreſſion, could not prevent indecent ideas from ariſing *out* of the cauſe? Where the purpoſes of public juſtice require that indecent

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decent evidence ſhould be given, as upon an indictment for a rape, the court muſt of neceſſity ſubmit to the inconvenience; otherwiſe crimes would go unpuniſhed, and offenders eſcape. So, if neceſſary to the deciſion of private wrongs, or to the rights of individuals. Mr. Juſtice *Burnet* therefore was clearly wrong, (and it is not diſputed that he was ſo,) in refuſing to try the action of defamation before him, in which a woman charged a man with having proclaimed to the world that ſhe had a defect in a particular part of her body. The defendant by way of plea juſtified, averring that it was true ſhe had ſuch a defect. When the cauſe was called on, Mr. Juſtice *Burnet* threw the record out of court. But the plaintiff was an injured perſon: Therefore he certainly ought to have entertained the ſuit.—Suppoſe a queſtion were to ariſe upon the right of inheritance of an *hermaphrodite*, who, Lord *Coke* ſays, "ſhall be heir, either as *male* or *fe-*
"*male*, according to that ſex which prevails*." For the ſake of private juſtice it would be neceſſary to hear and decide upon the fact. So, in the caſe of a particular diſeaſe excepted out of a policy for life. But not, if it were a mere voluntary wager, whether ſuch a perſon were an hermaphrodite, or had a particular diſorder. No more would the court tolerate a wager, as to the cauſe why a married woman did not breed. And numberleſs other inſtances might be put. So palpable is the objection, that it is impoſſible to illuſtrate it by particular caſes without falling into indecency. 2. It affects the peace and comfort of a third perſon, and, as ſuch, the peace of ſociety. The caſes to which this has been compared, bear no ſimilitude to it. There is no ridicule attending a wager upon the ſex of an unborn child. In the caſe of the Earl of *March* verſus *Pigott*, the reproach did not fall upon thoſe who were the ſubject of the wager, but upon the parties themſelves who laid it.—*Jones* v. *Randal* was a hedging wager by a party who was intereſted; it reflected on nobody: The event was quite uncertain; and the court determined that there was no objection to it, either in morality or policy. (Lord *Mansfield*.—Never was a queſtion more doubtful how it would be decided till it was actually determined.) But in this caſe, the intereſt of *D'Eon*, as well as his private feelings, are moſt materially affected. By the inveſtigation of his ſex he may be expoſed to ridicule and contempt: And if, as was aſſumed in the argument, it goes to prove him an impoſtor, it is adding infamy to ridicule. It can never be, that mere volunteers in a wager ſhall be permitted wantonly to expoſe to the public view every

* *Co. Litt.* 8. *a.* 29. *b.*

every defect and imperfection of those they think fit to select for the purpose; and, in aid of the enquiry, disturb the peace of whole families, by calling confidential friends, professional attendants, near relations and necessary attendants to give testimony of the fact.—Therefore, upon principles of justice, the court will now do what ought to have been done at the trial, and allow the objection. 1778. DA COSTA *versus* JONES.

Lord MANSFIELD.—This case, upon the trial of the first cause, made a great noise all over *Europe*: And soon afterwards I own I was sorry, that the answer given to the objection made at the trial, "that it appeared upon the record," had been so hastily given way to by me. I was sorry that the nature of the action had not been more fully considered. I was sorry for another thing; that the witnesses who were *subpœnaed* had not been told they might refuse to give evidence if they pleased. But no objection was made on their behalf by the counsel for the defendant, nor did any of themselves apply for protection, or hesitate to answer. I have since heard that many of them were confidential persons, servants, and others employed in the way of their profession and business. Had any of them demurred, it would have opened the nature of the action. That two men by laying a wager concerning a third person, might compel his physicians, relations, and servants, to disclose what they knew relative to the subject matter of that wager, would have been an alarming proposition; the bare stating it would have startled. Indeed, the objection being put upon the general crude ground of the cause leading to indecent evidence, and not upon the special nature of this case, did not strike me. For indecency of evidence is no objection to its being received, where it is necessary to the decision of a civil or criminal right: And upon that ground, we think Mr. Justice *Burnet* did wrong, in rejecting the case that came before him; for there, the party had received an injury. But if it had been an action upon a *wager*, Whether such a woman had such a defect or infirmity? it would have been nearly the present case. Indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular acts of parliament: And the restraints imposed in particular cases, support the general rule. For where parliament interposes and says, "unless you have an interest in such a case, any wager or insurance upon it shall be void and of no effect;" it implies, that in cases not specially

prohibited

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prohibited by act of parliament, parties may wager or insure at pleasure. And this species of contract has, in fact, gone to an extent that is much to be complained of. Whether it would not have been better policy to have treated all wagers originally as *gaming contracts*, and so have held them void, is now too late to discuss: They have too long and too often been held good and valid contracts. But notwithstanding they have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties, by laying a wager, shall not be permitted to form a ground for an action or a judicial proceeding in a court of justice. Suppose a wager between two people, that one of *them*, or that a *third* person, shall do a criminal act. To go from stronger cases to those that are less strong. "I lay you a wager you do not beat such a person. "You lay that you will." Such a wager would be void: Because it is an incitement to a *breach of the peace*. Suppose the subject matter of a wager were a violation of chastity, or an immoral action: "I lay I seduce such a woman." Would a court of justice entertain an action upon such a wager? Most clearly not; because it is an incitement to *immorality*. Suppose a wager upon a subject *contra bonos mores*, like the case of Sir *Charles Sedley*: Would a court of justice try a wager that incites to such indecency? It may be said, there are no adjudged cases; but you offend; you misbehave by laying such a wager. To come nearer to the point: Suppose a wager that affects the interest or the feelings of a third person; which is one of the grounds upon which the motion for a new trial in this case has been argued. For instance: That such a woman has committed *adultery*. Would a court of justice try the adultery in an action upon such a wager? Or, a wager that an unmarried woman has had a bastard. Would you try that? Would it be endured? Most unquestionably it would not. Because it is not only an injury to a third person, but it disturbs the peace of society; and in either of these two last cases, the party to be affected by it would have a right to say, How dare you bring my name in question? If a *husband* complains of adultery, *He* shall be allowed to try it; because he is a party injured. So, if it be *necessary to justice*, to try whether such a one is a bastard; it shall be tried. But third persons, merely for the purpose of laying a wager, shall not thus wantonly expose others to ridicule, and libel them under the form of an action.

We then come to the present case, which is shortly this: Here is a person who appears to all the world to be a man; is stated

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ſtated upon the record to be "*Monſieur Le Chevalier D'Eon*;" has acted in that character in a variety of capacities; and has his reaſons and advantages in ſo appearing. Shall two indifferent people, by a wager between themſelves, injure him ſo, as to try in an action upon that wager, Whether (as was ſaid in the argument) he is a cheat and impoſtor? or, ſhew that he is a woman, and be allowed to *ſubpœna* all his intimate friends, and confidential attendants, to give evidence that will expoſe him all over *Europe?* It is monſtrous to ſtate. It is a diſgrace to judicature. And if the *Chevalier*, by application to the court or otherwiſe, had come and ſaid, "here is a villainous wager laid to injure me; "I pray the court, as a third perſon whoſe intereſt it affects, to "ſtop it;" the court would inſtantly have done it: Upon the ſame principle as the court ſtayed the proceedings, upon the application of Mr. *Muilman*, in the caſe of *Coxe* v. *Phillips**. Wherever a queſtion ariſes upon a real matter of right, though the intereſt of third perſons, not parties, may be affected by it, it ſhall be tried.—If a witneſs lays a wager upon the ſubject matter in diſpute between a third perſon, it does not affect his evidence ſo as to defeat either party of it.

* *Caſ. temp. Hardwicke*, 237.

I think the other ground is material. The queſtion is upon the ſex of a perſon, to the appearance of all the world, a man; and who, for reaſons of his own, thinks proper to keep his ſex a ſecret. The medium of proof upon ſuch a queſtion muſt ariſe from the circumſtances that diſtinguiſh the ſexes. This neceſſarily tends to introduce all the indecent evidence ſuch an enquiry can involve. Suppoſe two perſons were to lay a wager upon a mark or defect in a woman's body. Will the court ſay they would ſuffer her chambermaid to be called, to give evidence upon ſuch a queſtion.—The caſe mentioned in the argument, of an inſurance by two ſons upon the lives of their reſpective fathers, and other caſes, where the life of one perſon is run againſt another, are not caſes that injure or affect the individuals who happen to be made the ſubject of ſuch wagers. They are no reflection or injury to them. So, a wager whether the next child ſhall be a boy or a girl, hurts no one. But the preſent caſe is indecent in itſelf, and manifeſtly a groſs injury to a third perſon; therefore, ought not to be endured. We think the objection appears ſufficiently upon the record, and that there is ground enough upon theſe allegations to arreſt the judgment.

The three other judges concurred.

Per cur. Rule for arreſting the judgment abſolute.

1778.

Same day.

ROEBUCK *et al. verſus* HAMMERTON.

A policy upon the *life* of a perſon, is a *wagering* policy within the ſtat. 14 *Geo.* 3. *c.* 48.

THIS was an action upon another wager in the form of a policy on the ſame ſubject as the preceding caſe, with this difference only; that it was made *ſubſequent* to the ſtat. 14 *Geo.* 3. *c.* 48. by which, "all inſurances upon *lives*, or "any *other event* or events, *without intereſt* in the parties, are "made null and *void*." The queſtion reſerved therefore at the trial, was, Whether this were a policy within the act; and if the court ſhould be of opinion that it was, then a nonſuit was to be entered. Mr. *Buller* accordingly moved the *ſecond* day of this term, that the verdict given for the plaintiff might be vacated, and that a judgment of nonſuit might be entered inſtead; and for leave to move in arreſt of judgment, and to ſtay the proceedings if his firſt motion did not ſucceed.—Lord *Mansfield*, after delivering his opinion in *Da Coſta* verſus *Jones*, "that the objection ſufficiently appeared upon the re-"cord," ſaid, "*that* made it unneceſſary to go into the queſ-"tion, Whether this were a policy within the above ſtatute; "therefore, a nonſuit ought to be entered." But the counſel for the plaintiffs, on account of the *coſts*, praying to be heard upon it, the court permitted them to enter into the argument. They inſiſted that the ſtatute did not extend to this caſe; that it was not only not a policy, but the ſubject matter itſelf was incapable of inſurance; and that the nature of the act, not the form of the inſtrument, ought to decide. But this was a mere *wager reduced into writing*, not upon any *future* contingency, but upon a fact *then exiſting*; and therefore, to conſtrue it a policy within the meaning of the ſtatute, would be to extend the act to all wagers, where the parties for greater ſecurity might think proper to reduce them into writing. Lord *Mansfield* ſtopped the counſel for the defendant, ſaying, it was too clear to give themſelves any trouble. The parties themſelves have called it a policy, it is indorſed a policy, opened as a policy; and any number of perſons whatever might have ſubſcribed it as ſuch. Therefore it is clearly within the act; and a nonſuit ought to be entered.

Per cur. Let a nonſuit be entered.

1778.

KNIGHT *verſus* BATE.

Aſton, Juſtice, abſent. *Tueſday*, *Feb.* 3d.

If a ſtatute for allotting waſte lands within a manor, direct all diſputed claims to be tried by a feigned iſſue, and *limit* the time of *bringing* ſuch action, to ſix *months*; an action brought againſt a copyholder *within time*, if *abated* by his death, muſt be *revived* againſt the *heir*, *within ſix months* after the plaintiff has *notice of the deſcent*, tho' the heir be *not admitted* till long after that time.

THIS was an iſſue to try whether the defendant, as owner of a certain meſſuage and lands, was entitled to an allotment of land upon *Broadwaters Common*, in the county of *Worceſter*.——The defendant pleaded a private act of parliament, 15 *Geo.* 3. *c.* 25. for dividing and allotting the common and waſte lands in the manor and pariſh of *Wolverley* in the county of *Worceſter*; by which act, commiſſioners are appointed for aſcertaining claims; and that by a clauſe in the act it is provided, that if their award is made in *November*, *December*, *January*, *February*, or *March*, any perſon diſſatisfied with ſuch determination, may bring their action in the form of a feigned iſſue within ſix months, and try their claims at the 1ſt, 2d, or 3d aſſizes next after ſuch determination: And in caſe of no ſuch action brought, commenced, or proceeded in within the times aforeſaid, then, ſuch order of the commiſſioners is to be final. That the defendant's father was entitled to a copyhold, and claimed a ſhare of common in reſpect of ſuch his copyhold eſtate. That a diſpute aroſe between him and the plaintiff touching his right; and that the commiſſioners upon examination of witneſſes awarded in favour of him on the 12th *Auguſt* 1775. That on the 8th of *November* 1775, a *latitat* was taken out by the plaintiff to try the right. That on the 29th of *November* 1775, *Bate*, the father, died: Upon whoſe death the writ abated. That the copyhold eſtate deſcended to the defendant, and he entered as heir at law to his father, of which the plaintiff had *notice*. That the plaintiff did not within ſix months after the award, or within ſix months after he had notice of the death of the ſaid *Bate*, the father, and of the premiſes deſcending to the defendant, commence his action and try it within three aſſiſes.—The plaintiff replied (*proteſting* he had *no notice* of the deſcent to the defendant, proteſting alſo that the defendant wilfully neglected being admitted tenant of the copyhold) that the defendant was *not admitted* tenant of the eſtate till the 10th of *October* 1776, and that the plaintiff did, within ſix months after he was ſo admitted, commence his action. Demurrer; and joinder in demurrer.

Mr. *Leycester*, for the defendant, ſtated the queſtion to be, Whether the action was commenced within time? which, he ſaid, depended upon whether the ſix months limited by the

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ſtatute were to be computed from the time of the *anceſtor's death*, or from the time of the *heir's admittance*; and he contended they ought to be computed from the death of the anceſtor. He ſaid, it was clearly ſettled, that an heir upon whom a copyhold deſcends, is as perfect tenant, and as compleatly in poſſeſſion of the land, as to all *ſtrangers*, by the deſcent, as if he were in by admittance. *Co. Comp. Cop. ſect.* 41. He may enter, take the profits, and maintain treſpaſs. *Simpſon* verſus *Gillion*, *Noy*, 172. *Clark* v. *Pennifather*, 4 *Co.* 23. S. P. He may bring ejectment or alien. *Rumſey* verſus *Eves*, 1 *Leon.* 100. In a word, he is liable to all duties, and entitled to all advantages, as well before as after admittance; which is only a matter between him and the lord to entitle the lord to his fine; but as to all other perſons, it is indifferent.—As to the proteſtation of the plaintiff that he had no notice of the deſcent, actual notice is in no caſe neceſſary. The *entry* and *poſſeſſion* of the tenant are acts of ſufficient notoriety in copyhold as well as in freehold caſes, to make it incumbent upon all perſons concerned, to *take* notice; and indeed more ſo than admittance itſelf: becauſe, that is only a private ceremony at the lord's court. But, *ſecondly*, ſuppoſing admittance neceſſary, ſtill the action in this caſe is not brought in time; for as the writ abated by the death of the anceſtor, the plaintiff ſhould immediately, upon the admiſſion of the defendant, have continued it by *Journey's accounts*, and purſued it with due diligence. *Spencer's* caſe, 6 *Co.* 10. *Winch.* 82. 1 *Lutw.* 287. 1 Ld. *Raym.* 283. *Wilcox* v. *Huggins*, 2 *Str.* 907. *Fitz. Gib.* 170. S. C. The general rule laid down by all theſe authorities is, that wherever a ſuit is continued by *Journey's accounts*, it muſt be done *recently*, and within a reaſonable time. But in this caſe, the plaintiff has not uſed due diligence; and though particular circumſtances may excuſe, yet as the plaintiff muſt have been fully prepared, (having before brought his action againſt the defendant's father,) there can be no ſpecial reaſon aſſigned to juſtify his delay, which has been injurious to all parties; and therefore the defendant ought to have judgment.

Mr. *Bower*, *contra*, for the plaintiff, ſtated, that the plaintiff had ſued out writs againſt three other defendants in three ſeveral actions, depending preciſely upon the ſame queſtion as the action brought againſt the defendant's anceſtor. That in the firſt of theſe three cauſes, a verdict at the trial paſſed for the plaintiff; upon which, a verdict by conſent was taken for him in the other two; and *that* probably would have been the caſe

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in the action againſt the defendant's anceſtor, if it had not been abated by his death; the right being fully determined by the verdict in the *firſt* cauſe. Therefore, the juſtice of the caſe was clearly with the plaintiff.—As to the queſtions ariſing upon the demurrer, he inſiſted, that the poſition laid down by Mr. *Leyceſter*, that the heir of a copyholder is tenant to all intents before admittance, was by no means eſtabliſhed by Lord *Coke* in the latitude contended for. So far he was ready to admit, that the heir is conſidered as *tenant* againſt all *wrong-doers*: but *that* is from the *neceſſity* of the caſe; becauſe the title muſt be in *ſomebody*, and it clearly is not in the *lord*. So, in ſome caſes he may *alien* before admittance; becauſe it may be uncertain when a court will be held. But if he wilfully neglect to be admitted, he ſhall not; and ſo it was expreſsly agreed in 1 *Leon.* 100. That caſe is alſo in point to ſhew, that a ſtranger is not bound to take notice of the heir as tenant before admittance. But here moſt clearly he could not; becauſe this action muſt be brought againſt the *owner*, not againſt the *occupier*; therefore, till admittance, a ſtranger could not know againſt whom to bring it. If the defendant meant that third perſons ſhould be bound by his title, he ſhould have furniſhed them with proper evidence of it. Inſtead of which it ſtands confeſſed by the demurrer, that he wilfully neglected to be admitted. He alone then has prevented the action from being brought ſooner; and therefore ought not to be permitted now to avail himſelf of his own wrong.—As to the ſecond queſtion, Whether the action was brought in time, *after* the admittance of the defendant? he ſaid, the doctrine of *Journey's accounts* was inapplicable to this caſe, except by analogy to ſhew that the ſecond writ ought to be ſued out in a *reaſonable* time. As to that, in *Spencer*'s caſe*, it is ſaid "to be entirely "in the diſcretion of the court;" and by the authorities, it is clear the time allowed has been often varied. In the caſe cited from 1 Ld. *Raym.* 283. it is ſaid, that "formerly *half a year* "was allowed:" In *Gifford* verſus *Young*, 1 *Lut.* 297. the reporter ſays, "there was no judgment, becauſe the court were "divided, whether *four months* between the death of the defend-"ant and the purchaſe of the ſecond writ, was a reaſonable "time." In *Sir Thomas Finch* v. *Lambe*, *Cro. Car.* 294. a new original was brought *a year* after reverſal of the outlawry, and adjudged good. And in the *Year-book*, 6 *Ed.* 3. 32. *b. ſix months* was ſaid (*arguendo*) to be ſoon enough, and not denied.

* 6 *Co.* 16.

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Lord MANSFIELD.—It is averred in the plea, that the plaintiff had notice of the eſtate having deſcended to the defendant as heir at law; that he had entered, and that he was in poſſeſſion; in ſhort, of every thing neceſſary to enable the plaintiff to have revived his ſuit in due time.

Mr. *Bower*. We could not take iſſue upon two facts. We were obliged to give up one. We admit the defendant was in poſſeſſion, but we ſay he negligently refuſed to be admitted.

Lord MANSFIELD.—It is abſolutely averred, that you had *notice* of the entry and poſſeſſion of the defendant; and you might have taken iſſue upon the notice. The prejudice you have raiſed in our minds in this caſe is, from what you have ſtated *out* of the record, which we cannot take notice of upon this argument; nor do I well ſee how we can get at it. If the defendant's father in his life-time had made any engagement to abide by the event of the other cauſes, or if on the trial of the other actions, the defendant himſelf had ſaid, he would not be at the trouble of trying the queſtion over again, and by that means had induced the plaintiff to lie by, the court might get at it by a collateral motion. But no ſuch circumſtances appear. Therefore laying all that you have ſuggeſted out of the caſe, Where is the doubt? The ſtatute ſays, the action is to be brought within ſix months and upon a feigned iſſue. An action is brought within ſix months; but by the death of the defendant the ſuit is abated. Surely it can never admit of a queſtion where the original action is to be brought within *ſix* months, whether the *revival* of the ſuit may be delayed for a whole *twelvemonth?* There might be a doubt, whether the plaintiff ought not to have ſix months from the time of the abatement of the ſuit? but there is no pretence for more.—The admittance is entirely out of the queſtion, being a matter only between the lord and tenant. What impediment was there, after notice of the deſcent, to hinder the right from being tried in a feigned iſſue before admittance?—Therefore let there be judgment for the defendant.

Per. Cur. Judgment for the defendant.

Ex parte COTTRELL in the matter of EAVES, a Bankrupt.

Same day.

THIS was a caſe out of *Chancery* for the opinion of this court, ſtating in ſubſtance as follows:—*Catharine Eſſex, ſingle woman*, on or about the 25th *June* 1766, went to live with, and was hired by *Richard Eaves*, then or late of *Sarehole* in the pariſh of *Yardley* in the county of *Worceſter*, *innholder*, dealer and chapman, to ſerve him from that day for the ſpace of one year. And the ſaid *Richard Eaves* was to pay the ſaid *Catharine Eſſex* 5*l.* 5*s.* for ſuch ſervice. After the ſaid *Catherine Eſſex* had lived with the ſaid *Richard Eaves* for about five months, the ſaid *Richard Eaves*, by promiſing frequently to marry her, prevailed on her to permit him to have *carnal knowledge* of her: And ſhe continued in his ſervice for eight years from the ſaid 25th of *June* 1766; and during that time had *two children* by him, one of which died ſoon after it was born, and the other is now living. And ſhe never received any wages whatever from the ſaid *Richard Eaves* for ſuch ſervice, though ſhe often requeſted him to pay her; and he as often *promiſed* to pay her. That, in or about the month of *June* 1774, the ſaid *Richard Eaves* being upon the point of marriage with a perſon of large fortune, and wanting to remove the ſaid *Catherine Eſſex* and the child from him, the ſaid *Richard Eaves*, with the conſent of the ſaid *Catherine Eſſex*, intimated his wiſh to *Joſeph Cottrell*, of *Sparke Brooke*, in the pariſh of *Yardley*, in the county of *Worceſter*, blackſmith, and treated with him to marry her; and *promiſed* that *if he would marry her, and ſettle a freehold houſe and land* at *Yardley* aforeſaid, which he was ſeiſed of in fee, of the yearly rent of 15*l.* and upwards, *upon* the ſaid *Catherine Eſſex for her life, and take care of the child*, the ſaid *Richard Eaves* would *give* the ſaid *Joſeph Cottrell* 42*l.* for the ſaid *Catherine Eſſex*'s eight years' wages, and *a bond* for the payment of 400*l.* by inſtallments.

That accordingly, by leaſe and releaſe of the 23d and 24th *June* 1774, *Cottrell*, in *conſideration* of the intended *marriage*, ſettled the premiſes upon himſelf for life, remainder to the ſaid *Catherine Eſſex for life*, remainder to the iſſue of the marriage, &c. That on the 25th *June* 1774, *Richard Eaves*, for the *conſiderations* aforeſaid, and in *purſuance of the agreement* between him and *Cottrell*, entered into a bond in the penal ſum of 800*l.*

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conditioned for the payment of 400 *l.* to the plaintiff by inſtallments. That on the 29th of *September* 1774, *Joſeph Cottrell* was *married* to the ſaid *Catherine Eſſex* his preſent wife, and has ever ſince *maintained* the ſaid *child*. That on the 6th of *March* 1775, before any payment on the bond became due, *Eaves* was declared a bankrupt.—The queſtions were, 1ſt, Whether under all the circumſtances of the caſe, *Joſeph Cottrell* was entitled to come in as a creditor under the commiſſion of bankrupt againſt *Eaves?* 2dly, Whether the ſaid *Joſeph Cottrell* would be barred from recovering the money ſecured by the ſaid bond, in caſe the bankrupt ſhould obtain his certificate?

Mr. *Wilſon* for the plaintiff had begun to argue, but Lord *Mansfield* interrupted him, inquiring what could be objected to the bond?

Mr. *Chambre*, *contra*, ſaid, the objection to the bond was, that it was *not* within the ſtat. 7 *Geo.* 1. not being founded on a *bonâ fide* and *good* conſideration.

Lord MANSFIELD.—It is a good conſideration *between the parties*. It is a ſtipulation between them in conſideration of marriage: The one has performed his part, and married the woman; the other is therefore bound to perform his: There is no ground to impute any fraud in the caſe.

Afterwards, on *February* 10th, in this term, the court certified in theſe words:

Anſwer to the firſt *quære*. Having heard counſel on both ſides and conſidered this caſe, we are of opinion that the petitioner *Joſeph Cottrell* is entitled to come in as a creditor under the commiſſion of bankruptcy iſſued againſt *Richard Eaves*.

To the ſecond *quære*. We are of opinion that he will be barred.

Mansfield,
R. Aſton,
E. Willes,
W. H. Aſhhurſt.

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Thurſday, Feb. 5th.

HARRINGTON, *qui tam*, *verſus* JOHNSON.

In a *qui tam* action for inſuring tickets contrary to ſtat. 16 *Geo.* 3. *c.* 34. the court will not ſtay the proceedings upon an affidavit of the defendant, that a *former action* had been brought againſt him in *C. B.* for the *ſame offence*, in which he had leave to *compound*: But, he muſt *plead* ſuch matter ſpecially.

MR. *Wallace* had obtained a rule for ſtaying the proceedings in this caſe, which was an action againſt the defendant for inſuring lottery tickets contrary to the ſtat. 16 *Geo.* 3. *c.* 34. The application for the rule was founded upon an affidavit made by the defendant, ſtating that a *former action* had been brought againſt him in the *Common Pleas*, for the *ſame offence*, at the ſuit of one *Wood*, in which the court had given him leave to compound*.

Mr. *Bearcroft* now ſhewed cauſe, and contended, that the affidavit of the defendant, ſtating only *generally* that this action was for the *ſame offence* as that in the *C. B.* was not ſufficient. That it ought to have ſpecified the particular inſurance which made the ſubject matter of the former action; either by ſhewing the numbers of the tickets, or for whom inſured, and when; which would have been the means of ſatisfying the court that the offences really were the ſame. At leaſt, the application ſhould have been ſupported by other affidavits. Being deficient in both thoſe circumſtances, the proper and only mode of relief was, to *plead* the former action and leave of the court to compound, if it were warranted by the truth of the caſe.

Mr. *Wallace*, *contra*, in ſupport of the rule ſaid, the offence was *keeping an office* for the inſurance of tickets; *not* the act of *inſuring*; for *that* is only *evidence* of the *keeping*: And that there could be but *one* offence of *keeping*, attended with *one* penalty. Conſequently, there was no neceſſity for the defendant to ſtate any thing more, than that he had already been proſecuted for the ſame offence. As to pleading the former action and the leave of the court to compound, he ſaid, there never was an inſtance of the kind.—But the court were clearly of opinion, that this matter ought to be ſpecially pleaded: And accordingly directed the rule for ſtaying the proceedings to be diſcharged.

* *Vide* this caſe, 2 *Black. Rep.* 1157.

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Friday, Feb. 6th.

HANKEY *et al. verſus* JONES.

Merely *drawing* bills on a perſon's *own account*, at the expence of paying a quarter *per cent. commiſſion*, beſides intereſt at 5 *per cent.* for their being diſcounted, and borrowing *accommodation notes* in exchange for his own to the ſame amount, will not make a man an *object* of the *bankrupt laws*.

THIS was an iſſue directed by the Court of *Chancery*, to try whether the defendant was a bankrupt, and alſo the validity of the petitioning creditor's debt: At the trial before Lord *Mansfield* at *Guildhall*, at the ſittings after *Michaelmas* Term 1777, the jury found a verdict for the plaintiff on the *ſecond* iſſue, damages 1*s.* coſts 40*s.* and alſo a verdict for the plaintiff on the *firſt* iſſue, damages 1*s.* ſubject to the opinion of the court on the following caſe:—That the defendant, a *clergyman*, being poſſeſſed of lands in the Iſle of *Ely*, and engaged in expenſive works of cultivating and draining ſuch lands; to raiſe money for that purpoſe and his other occaſions, did before the year 1774, but more particularly in the years 1774, 1775, and 1776, *drew* bills, very many in number and to a very large amount in value, which were accepted by different perſons. That the defendant, in order to provide money for the payment of the ſaid bills, ſent caſh and other remittances to the acceptors, and *allowed* to ſome of his bankers a *quarter per cent.* for paying his bills, and alſo in many inſtances *paid* a *quarter per cent.* to the perſons who got them diſcounted, beſides intereſt at 5 *l. per cent.* The defendant alſo *borrowed accommodation bills* to a large value, in lieu of which he gave his own bills or notes to the ſame amount. He diſcharged all his bills and notes punctually till about the month of *April* 1777.—The queſtion for the opinion of the court was, Whether this were a *trading* within the true intent and meaning of the bankrupt laws? If it were a trading, then a verdict to be entered for the plaintiff on the firſt iſſue. If it were not a trading, then a verdict to be entered for the defendant on that iſſue.

Mr. *Douglas* for the plaintiff, ſtated that at the trial *two* objections were made to the validity of the commiſſion; 1ſt, That the defendant was a *clergyman* in prieſt's orders; and the clergy being prohibited by law from *uſing any manner of merchandize* *, the defendant could not legally be ſaid to be an object of the bankrupt laws: But this objection he ſaid was now abandoned. He ſhould therefore confine himſelf to the ſecond queſtion, Whether the defendant, by engaging in a courſe of tranſactions ſuch as were ſtated in the caſe reſerved, had rendered himſelf an object of the bankrupt laws? That is, Whether he came under the

* *Stat.* 21 *H.* 8. *c.* 13. *ſect.* 5.

the deſcription of "a perſon *uſing or exerciſing the trade of mer-* "*chandize?*" for he ſhould not contend that he fell within the other branch of the ſeveral ſtatutes that deſcribe bankrupts *, namely, of a perſon "ſeeking his trade of living by buying and "ſelling."—He ſaid if the words of the ſtatute were ſufficiently explicit in themſelves, ſo as not to admit of a doubt what tranſactions came within the deſcription of uſing the trade of merchandize, he could not go out of the act of parliament for a conſtruction of them: but that was not the caſe; the words "or "otherwiſe" leaving the ſubject open to great latitude. He conceived therefore the queſtion might properly be conſidered as a queſtion of the *lex mercatoria*; and he argued, that the law of merchants making part of the common law of *England*, the mode of determination in this caſe muſt be by the ſame *media*. Theſe, he ſaid, were, 1ſt, *Formal adjudications* of the courts of law; and where they were ſufficient to clear the doubt, the difficulty was at an end. 2dly, If they were not ſufficient, the next beſt authorities to reſort to, were the *dicta* of learned authors and writers upon the ſubject. 3dly, When they both failed, recourſe muſt be had to the common underſtanding of perſons executing that part of the law. And *laſtly*, general conſiderations of convenience and public utility were to be adopted. He ſhould therefore ſubmit to the court an argument drawn from all theſe ſources; and hoped to ſatisfy the court, that the defendant ought to be conſidered, for the purpoſe of this queſtion, as a perſon *uſing the trade of merchandize*. And *firſt*, upon authorities, the caſe of *Sarsfield* verſus *Witherby*, *Comb.* 152. would, he conceived, be nearly deciſive of the queſtion. That was an action brought by the indorſee of a bill of exchange drawn by the defendant when at *Paris* on his travels. The note came by ſeveral meſne indorſements into the hands of the plaintiff, who brought his action on *the cuſtom of merchants*, ſtating the defendant to be a *merchant*. The defendant pleaded that he was *no merchant*, but a *gentleman* on his travels; and therefore not liable to the plaintiff's action. The plaintiff demurred, and the court held the plea was *good*. But upon a writ of *error* in the *Exchequer* chamber, the plea was over-ruled;

* Stat. 13 *El.* c. 7. 1 *Jac.* 1. c. 15. 21 *Jac.* 1. c. 19. The words of the latter ſtatute are, "all and every perſon or perſons uſing, or that ſhall uſe *the* "*trade of merchandize*, by way of bargaining, *exchange*, bartering, cheviſance *or* "*otherwiſe*," in groſs or by retail, *or* ſeeking his or her living by buying or ſelling, or that ſhall uſe the trade or profeſſion of a ſcrivener, receiving other men's monies or eſtates into his truſt or cuſtody.

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HANKEY *versus* JONES.

And the words of Lord Chief Baron *Pollexfen* upon the occaſion were remarkable; "This is a *merchandizable act*, and *binders* the "defendant from pleading that he was *no merchant*." And the report adds, "that judgment was reverſed, for that he was a "*merchant* by the *taking up of money*, and *drawing the bill*."

Lord MANSFIELD.—The queſtion here ariſes on a ſpecial caſe; Whether this act of drawing bills, is ſuch an act as makes the defendant a *ſcrivener* within the meaning of the ſeveral ſtatutes againſt bankrupts? *Every* man who draws bills of exchange, does a *merchandizable act*; but that does not make him liable to be a bankrupt.

Mr. *Douglas*. The next caſe is *Richardſon* v. *Bradſhaw*, 1 *Atk.* 128. That aroſe on a feigned iſſue, to try whether one *Wilſon* was a *trader*; and whether he was a *banker*. The caſe was tried before Lord Chief Juſtice *Lee*; and by the report it appears, that upon the firſt queſtion, "*Wilſon*, who was an agent, drew on "*Johnſon*, who was another agent, to the amount of 280,000*l.* "and *he* drew on *Wilſon* to the amount of 290,000*l.*; but there was no commiſſion money on either ſide. It was proved in the cauſe by various merchants, that *drawing and redrawing* bills to ſuch an amount was a *trafficking in exchange*, and ſuch a trafficking as would make a man liable to a commiſſion of bankruptcy. The jury aſked the judge, "Whether ſuch drawing and redraw-"ing was in point of law a *trading*?—The judge ſaid, it was not "ſo much a *point of law* as a point of *fact*, to be determined by "them on the *uſage of merchants*; and if they paid credit to the "evidence, this was a trading. The verdict given by the jury "was, that *Wilſon* was a trader and a bankrupt.—There was no "motion for a new trial, and the caſe was acquieſced in." It is true, there have been doubts whether the direction of Lord Chief Juſtice *Lee* was right. But as the caſe was acquieſced in, it is a very ſtrong authority for the plaintiff.

Lord MANSFIELD.—I was counſel in that caſe. I do not remember there was any motion for a new trial: But a very material circumſtance there was, that *Wilſon* kept other people's money.

Mr. *Douglas*. *Thirdly*, Merchants may be conſulted as to the uſage and cuſtom amongſt them. In *Mich.* 19 *Jac.* 1. *Winch.* 24. in the caſe of *Vanbeath* verſus *Turner*, *Hobart* Chief Juſtice ſaid, "If any doubt ariſes about the cuſtom of merchants, the court "may ſend for the merchants to know it." So *in Hardres*, 485. *Hale* Chief Baron ſaid, "It were worth while to enquire what "the courſe had been amongſt merchants, or to direct an iſſue

"for

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" for trial of the cuſtom amongſt them." In *Edie* verſus *The Eaſt India Company*, 2 *Bur.* 12 6. where a bill of exchange was drawn by Lord *Clive* on the *Eaſt-India-Company*, made payable to one *Campbell* or *order*, who indorſed it over to *Ogleby*, *without* the words " *or order*," who indorſed it over to *Edie*, *with* the words " *or order*," the queſtion was, Whether it was aſſignable? Lord *Mansfield* at the trial was of opinion, " that it was a proper " queſtion to be enquired of the merchants. But the court after- " wards held it improper, becauſe the point had been already ad- " judged."—Mr. *Douglas* ſaid, " He ſhould infer from this caſe, " that where a queſtion is not ſettled by the *lex mercatoria*, it " was competent to enquire of merchants what the uſage was. " He did not mean it was competent to aſk, Whether ſuch a " one was a *bankrupt?* but it was competent to aſk, Whether " ſuch a particular tranſaction amounted to a *trafficking* in ex- " change within the *uſage* of *merchants?* That though there " were no merchants examined at the trial of this cauſe, it was " the *general opinion* of merchants in the city of *London*, that this " was a *drawing*; and that opinion was corroborated by the " caſe of *Richardſon* verſus *Bradſhaw*. *Laſtly*, on the ground of " public convenience and utility, he ſaid, it appeared to him " moſt neceſſary to the ſpirit and freedom of commerce, that " there ſhould be a facility of raiſing great ſums of money for " the purpoſes of trade, without the formal, ſolemn ſecurity ne- " ceſſary from perſons who are not merchants. That large " ſums of money were daily advanced to perſons, who dealt in " drawing and negotiating notes in the manner *Jones* had done, " upon the faith that ſuch perſons were liable to the bankrupt " laws: If ſo, though it might not ſtrictly be ſaid to be a trading, " it fell within the maxim, that *communis error facit jus*. Upon " the whole, therefore, he ſubmitted, that the defendant was " ſubject to the bankrupt laws."

Mr. *F. Walker*, *contra*, argued, that the defendant did not come within the deſcription of a perſon uſing the trade of merchandize. As to the caſe of *Sarsfield* verſus *Witherby*, it was neceſſary for the plaintiff to declare upon the cuſtom of merchants.

Lord MANSFIELD.—That caſe has nothing to do with the conſtruction of the bankrupt laws: A man merely drawing a bill payable to a perſon who has bought a horſe or any thing elſe, will not make him a bankrupt. The queſtion here is, Whether this man comes under any of the deſcriptions of a perſon liable to a commiſſion of bankruptcy, within the true intent and meaning of the ſtatutes concerning bankrupts?—Mr. *F. Walker*, the other caſe that

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that has been cited of *Richardſon* v. *Bradſhaw* makes for the defendant; becauſe there, it was adjudged to be an *exchange* and *rechange*; a *drawing* and *redrawing* within the acts of parliament. With reſpect to public utility and convenience, arguments drawn from thence are only of uſe where the law is ſilent. But they cannot be oppoſed to adjudged caſes; no more can the private opinions of merchants: Much leſs can they, upon the conſtruction of laws ſo penal as the ſtatutes againſt bankrupts, by which ſome offences are made even a capital felony. Then, as to the *facts* from whence it is inferred that the defendant is a *trader*; they are, 1ſt, "That the defendant has had great undertakings in the draining of lands and improving them; and "that, to raiſe money for this purpoſe, he drew bills of exchange "to a conſiderable amount; which bills were accepted by diſferent perſons." But the mere drawing bills of exchange, in the manner and for the purpoſe above ſtated, is not a drawing within the intent of the bankrupt laws. If it were, every body who has drawn bills of exchange would be within the deſcription of a perſon liable to become bankrupt. Will the *acceptance* of bills ſo drawn aſſiſt to make the tranſaction more a trading? Clearly not. With reſpect to the reſt of the facts ſtated, they are ſo far from amounting to a trading, that they are a proof of the very reverſe. For, inſtead of trafficking with theſe bills ſo drawn, for *barter* or *profit*, the only act he does is to pay commiſſion money, beſides intereſt, to the different perſons upon whom they were drawn, or who diſcounted them. In *Wilſon*'s caſe, he was concerned in *drawing* and *redrawing*, which is a trading within the intent of the act. And perſons concerned in that branch of trade are well known by the name of *exchange brokers*. But in this caſe, the defendant was never drawn upon; he only drew; and *that*, not for the purpoſes of trade, but for the particular purpoſe of *draining* and *improving lands*, which is no ſpecies of trading within the proviſions of the bankrupt laws. Therefore there is no pretence for ſaying he is an object of them.

Lord MANSFIELD.—This is a queſtion upon the conſtruction of the ſtatutes concerning bankrupts; and the caſe ſtates particularly the only thing done by the defendant, from which it can be argued that he is become a bankrupt, within the deſcription and meaning of the bankrupt laws. By the ſtatute 13 *Eliz. c.* 7. the deſcription is this: "*Any merchant* or other perſon "*uſing* or exerciſing the *trade* of *merchandize*, by way of bar-

"gaining,

" gaining, exchange, rechange, bartry, chevisance or otherwise, " in gross or by retail, or seeking his or her trade of living by " buying and selling." The stat. 21 *Jac.* 1. *c.* 19. gives a fuller description. " All and every person or persons using, or that " shall use the *trade* of *merchandize*, by way of bargaining, ex- " change, bartering, chevisance or otherwise, in gross or by " retail; or seeking his or her living by buying and selling; or " that shall use the trade or profession of a *scrivener*, receiving " other men's monies and estates into his trust or custody, who " at any time after, *&c.*" These are the descriptions of a bankrupt. And the facts necessary to shew what was the nature of the business carried on by the party being laid before the court, whether they come within any of the descriptions enumerated in the statutes, is a question of *law* upon the construction of the statutes themselves. It is not using an *act* of merchandize. Every man does that: Every man buys: But that does not bring a man within the description of a person liable to become bankrupt. He must use the *trade* of *merchandize*. He must therefore *sell* as well as *buy*: nor will every act of selling do; for there are various species of selling, which are no trading within the meaning of the acts; as where a farmer buys in sheep, and sells them again, *&c.* The fact stated in the present case, from whence it is contended that the defendant is liable to a commission of bankrupt, is, that on *his own account*, and for his *own benefit*, he has *raised money* on his *own bills*, at the expence of paying a quarter *per cent.* commission, and 5 *per cent.* interest: And, to better his credit, has been used to get an additional security from other persons, by borrowing their bills; in lieu of which, he gave them his own to the same amount. The question therefore is, Whether the circumstance of a man borrowing money on his own bills, for his own occasions, makes him an object of the bankrupt laws.—I had not a particle of doubt at the trial: But I desired a case to be made for the opinion of the court, for the sake of that, which perhaps is more important than doing right: to bring all questions upon mercantile transactions to a certainty. General verdicts do not answer the purpose: But when a case is made, the profession know the result, the merchants know the result: And I rather desired it in this case, on account of the authority of *Richardson* versus *Bradshaw*, which has been so much relied on. As to that case, see what it was: *Wilson* was an agent to 26 regiments, and lived in *London*. *Johnson*, his correspondent, was also agent to many regiments and lived in *Dublin*.

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Dublin. The troops were occaſionally in *England* and *Ireland*; and when the troops that were in *Wilſon*'s department were in *Ireland*, *Johnſon* raiſed money to pay them: And ſo *vice verſâ*. *Wilſon*, from the year 1745 to 1757, drew on *Johnſon* to the amount of 280,000*l*; and *Johnſon* drew on *Wilſon* to the amount of 290,000*l*. They took no commiſſion, and there was no reaſon why they ſhould; for the advantage was equal. If one did not pay, he did not receive: And ſo with reſpect to the other. But what was the *purpoſe* of their *redrawing?* They drew for the money of many thouſand perſons, officers, widows, and ſoldiers together: And there was a viſible gain from thence ariſing from the exchange. What was the determination of the jury? Though it was not their province to ſay; it was a very ſenſible one: "Drawing and redrawing may or may not be exerciſing trade and merchandize." It depends on circumſtances. Suppoſe a perſon in *Yorkſhire*, with a large eſtate, has occaſion for money to pay a debt on mortgage, or any other ſecurity in the city of *London*; he draws on his banker for it, and to repay him, tells the banker to draw on him by bills. Would that be a drawing and redrawing, ſo as to conſtitute a trading within the meaning of the bankrupt laws? Certainly not. But take it the other way; that a perſon has the caſh of other people, to the amount of many hundred thouſands of pounds, and the benefit of the exchange ariſing from the remittance of it. *That* is merchandizing: And *that* was the ground upon which the jury went in the caſe of *Wilſon*. There is no greater fault in citing caſes, than that of drawing general concluſions from particular premiſes. In *Wilſon*'s caſe it was ſaid, "That drawing "and redrawing was merchandize." It does not follow that all drawing and redrawing is merchandize. The words of the jury in *Wilſon's* caſe were, "that drawing and redrawing for ſuch "large ſums of money is trafficking in exchange." But there was no redrawing in the preſent caſe; nobody redrew on the defendant, and all the drawing was to his loſs, and tended to his ruin; for he paid a quarter *per cent.* commiſſion, beſides intereſt, on every bill he drew. With regard to what paſſed at the trial in *Wilſon's* caſe, with great reſpect to Lord Chief Juſtice *Lee*'s memory, I think the jury aſked him a very proper queſtion; Whether this drawing and redrawing was, in *point* of *law*, a trading in merchandize within the ſtatutes concerning bankrupts? And as the note is taken, he might have *directed* them as it is there ſaid he did. But the report ſays, "He told them it was a

"queſtion of *fact*, and not of *law*." With all deference to his opinion, it was a queſtion of law upon the fact. It may be proper to leave it to the jury, whether the perſon gets a profit or remits other people's money; but the fact being eſtabliſhed, the reſult is a matter of law. In *Wilſon*'s caſe he had vaſt ſums of other people's money. But this caſe is ſtript of every circumſtance of that kind: Merely a drawing by a perſon for the purpoſe of improving his own eſtate; and he pays diſcount on what he draws. Therefore, there is no colour for ſaying he is within the deſcription of the bankrupt laws. 1778.

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The other judges concurred.

Per Cur. Poſtea to be delivered to the plaintiffs.

REX *verſus* JOHN WHITAKER.

Thurſday, Feb. 12th.

THE defendant was ſummoning bailiff to the ſheriff of *Middleſex*; and it was his province to ſummon jurors to attend to try cauſes. An attachment was granted againſt him, upon a *charge* of *demanding* and *receiving* money from ſeveral of the inhabitants to excuſe them from ſerving, and for ſummoning ſuch as refuſed to pay him, more frequently than it came to their turn. Being examined upon interrogatories, it appeared to the court upon the report of Sir *James Burrow*, that he admitted having received ſmall ſums from ſeveral individuals. That in ſome years he received in the whole about 60 *l.* or 70 *l. per annum*; and in every year ſomething, though ſometimes not more than 20 *l.* But he *denied* ever having *demanded* it, or having ever been guilty of *partiality*, either in excuſing thoſe who paid him, or in ſummoning thoſe more frequently than he ought to have done, who refuſed to pay him. He ſwore he received it only as a *Chriſtmas-box*, which had been cuſtomary; and in no other view whatever: And poſitively denied that he ever acted with any partiality in conſequence of its being given or refuſed.

The court thought this to be a very bad practice, and of very evil example: Wherefore they fined him 200 *l.* and ordered him to be committed, 'till paid. They added, that the ſheriff ſhould be informed of this, and that it ſhould be recommended to him to diſcharge this man from his office of ſummoning bailiff.

THE END OF HILARY TERM.

Memorandum.

1778. *Memorandum.* On the 1ſt of *March* died Mr. Juſtice *Aſton*, aged ſixty-two years.

He was ſucceeded by *Francis Buller*, Eſq. one of his Majeſty's counſel learned in the law. Mr. *Buller* kiſſed hands on the 1ſt of *May*. On the 6th, being the firſt day of *Eaſter* Term, he was called Serjeant;—the motto on his rings, *vim temperatam*. He was ſworn in the ſame evening; and on *Friday* 7th he took his ſeat on the bench.

EASTER TERM

18 GEORGE III. *B. R.* 1778.

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Friday, May 8th.

IN Caſe, the declaration conſiſted of *three* counts. The *firſt* ſtating, that whereas by ſtat. 9 *Ann. c.* 10. for eſtabliſhing one General Poſt-office throughout the kingdom, *&c.* it was enacted, that there ſhould be one General Letter-office erected in the city of *London*, *&c.* and that one Poſt-maſter General ſhould be appointed by letters patent under the Great Seal, which ſaid Poſt-maſter and his deputy, and deputies, *&c.* and *no other perſon* ſhould have the receiving, *&c.* of all letters: By virtue of which ſaid act, one General Poſt-office was erected, *&c.* and alſo a poſt was eſtabliſhed, between the city of *London*, and the town of *Lewes*, in the county of *Suſſex*. And whereas by letters patent in purſuance of the ſaid act, the *defendants* were *appointed* to the office of *Poſt-maſter General*, TO HAVE AND TO HOLD the ſame with all powers, *&c.* for and during his Majeſty's pleaſure; *except* always and reſerving to his ſaid Majeſty, *&c. all* and every the *duties* and ſums of *money* payable for the *poſtage* of letters, *&c. &c.* And whereas by the ſaid letters patent, his Majeſty, out of his ſpecial grace and mere motion, did give and grant to the ſaid defendants the ſalary of 2,000 *l. per annum, payable* out of the *revenue* aforeſaid, by the hands of the receiver or receivers general thereof; by virtue of which ſaid letters patent, the defendants were poſſeſſed of the ſaid office; and the ſaid defendants holding and exerciſing the ſaid office, the plaintiff, on the 24th of *September* 1774, was poſſeſſed of a certain promiſſory note, *&c.* commonly called a *bank-note*, for 100 *l.* and being ſo poſſeſſed, he incloſed it in a letter ſealed and directed to one *John Moxham*, at *Lymington*, in the county of *Hants*.

CASE does not lie againſt the Poſt-maſter general, for a bank-note ſtolen by one of the *forters* out of a letter delivered into the the Poſt-office.

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Hants. That the said letter was carried from *Lewes* to *London*, and there was entrusted to the care of the defendants at their office, in order to be sent and delivered by them as directed. Nevertheless they, not regarding the duty of their office, but wholly *neglecting* the same, did *not deliver*, or cause to be delivered, the said *bank-note* so enclosed: By reason of which neglect of the said defendants, and their servants or deputies, the said bank-note was wholly lost out of the said letter.

The *second* count stated, that the plaintiff being possessed of a note for 100*l.* inclosed it in a letter (*ut supra*) and that by the negligence of the defendants and of their servants and deputies, the said bank-note was *taken out* of the said *letter by one Richard Michel, a servant of the defendants*, and *employed* by them as a *sorter of letters*, who converted it to his own use; by reason whereof, the same was wholly lost to the plaintiff. The *third* count charged generally, that the bank-note by the negligence of the defendants was *stolen out* of the letter. The defendants pleaded not guilty. The cause was tried before Lord *Mansfield* at the Sittings after *Michaelmas* Term 1776, when the jury found the defendants *not guilty* on the *first* and *third* counts; and on the *second* they found a *special* verdict, stating in substance as follows.—The statute 9 *Ann. c.* 10. for erecting a General Post-office, setting out the substance of the *second* section. That by virtue of the said act, a General Post-office was erected, and a Post-office established between the town of *Lewes* and the city of *London*, and between *London* and the town of *Lymington*. That by stat. 1 *Geo.* 3 *c.* 1. it was enacted and declared "that the "revenue of the General Post-office should be carried to, and "made part of, the aggregate fund established by the stat. "1 *Geo.* 1. *c.* 12. It then set forth the letters patent appointing "the defendants to the office of Post-master General, bearing "date 11th *December* 1770, thereby granting to them and their "sufficient deputy or deputies full power and authority, and to "*no other person whatever*, to receive, carry, or deliver letters; "and to take and receive, *for the use of his Majesty*, all sums of "money limited by the act 9 *Ann. c.* 10. for the postage of such "letters respectively. And further granting to the said defend-"ants full power and authority to constitute and appoint, by any "writing under their hands and seals, such *deputies*, deputy Post-"masters, substitutes, *&c. &c. sorters*, *&c. &c.* as they should "think fit and necessary; and them, or any of them, from time "to time to suspend, *&c.* according to their discretion; and to

"take

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"take, in his said *Majesty's* name and for *his* use, from the said deputy Post-masters or other *inferior officers, such sufficient security* for their faithful discharge of their respective trusts, and for the payment of the money received by them respectively, to the Receiver-General of the said revenue for the time being; and from time to time to settle the salaries and allowances to the said inferior officers, as the Commissioners of the Treasury, or the High-treasurer for the time being, shall first approve of: The said *salaries* and allowances *to be paid out of the revenue* by the hands of the *Receiver-General:* And further granting to the said defendants a *salary* of 2,000 *l. per annum, payable* quarterly by the hands of the *Receiver-General*; and in regard the said Receiver-General is to receive and account for the said revenue, that the defendants should *not* be *chargeable* or accountable or *responsible* for the said revenue, or *for the officers* constituted or *appointed by them* as aforesaid; *save only* for their *own voluntary defaults* or *misfeazances.*" That by virtue of the said letters patent, the said defendants possessed themselves of the said office. That the said *Richard Michell,* on the 21st of *August* 1771, was in due manner appointed by the defendants, a sorter of letters in the inland department; and that on the 6th of *September* following, the said defendants took a *sufficient security* from him in the King's name, and for the *King's use,* for the faithful discharge of the trust of his said office, and for payment of the money to be received by him.—Then it set forth the *oath* taken by *Richard Michell* not to delay, or in any way to embezzle any letter or packet, *&c.* That he was employed as a sorter on the 24th of *September* 1774. That he received his *salary* out of the *profits* of the postage, by the hands of the *Receiver-General* and *not* from the *defendants:* That the plaintiff on the 24th of *September* 1774, was possessed of a bank-note for 100 *l*; that he enclosed it in a letter sealed and directed to *John Moxham,* of *Lymington,* in the county of *Southampton.* That the said letter was delivered into the General Post-office in *London,* in order to be there sorted, and conveyed by the post from thence to *Lymington.* That the said letter with the bank-note enclosed came to the hands of the said *Richard Michell* at the General Post-office in *London,* he being such sorter as aforesaid; and that he feloniously secreted the said letter and stole the bank-note thereout, contrary to the form of the statute. That he was tried, convicted, and executed for the same.

This case was argued twice; first, in last Term by Mr. *Cowper* for the plaintiff, and Mr. Serjeant *Walker* for the defend-

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ants: And again in this Term, by Mr. *Lee* for the plaintiff, and Mr. *Bearcroft* for the defendants. The queſtion was, Whether the defendants, by reaſon of their office, and by reaſon of the relation in which *Michell, the forter*, ſtood to them, were perſonally liable for the amount of the bank-note found by the ſpecial verdict to have been ſecreted and ſtolen by him *in the Poſt-office*: And the general ſcope of the argument was as follows.—For the *defendants* it was argued, that upon the facts ſtated in the ſpecial verdict, they were not liable to the plaintiff's action in this particular caſe. 1. Becauſe no perſonal neglect was brought home to the defendants themſelves.—2. From the conſtitution of the office, as eſtabliſhed by the ſtat. 9 *Ann. c.* 10. *Michell*, and all the other inferior officers were in effect the ſervants of the public, though nominated by the defendants.—3. The authority of *Lane* v. *Cotton*, 1 Lord *Raym.* 646. was in point, and deciſive for the defendants, having remained unqueſtioned and uncontroverted from the year 1699, to the time of paſſing the ſtat. 9 *Ann. c.* 10; and from that time to the preſent, without any action being brought, or any clauſe inſerted in any ſtatute relative to the Poſt-office in any wiſe impeaching it, or intimating a doubt upon the ſubject. Upon the firſt point, little was ſaid beyond the terms in which it was ſtated. Upon the ſecond point it was ſaid, that the ſtat. 9 *Ann. c.* 10. was made at the requeſt of the ſubject for a two-fold purpoſe. 1ſt, To raiſe a revenue to government. 2d, For the more ſecure, convenient, and ſpeedy conveyance of the general correſpondence of the kingdom. With this view, the ſtatute directs* that the revenue ſhall be appropriated to the *uſe of the public*; which in effect is ſaying, it ſhall be applied to the uſe of every individual in the ſtate: And without doubt, when ſo applied, every individual equally ſhares the common benefit.—In like manner, all the officers created by the ſtatute are for the *uſe of the public*. The Poſt-maſter General is the *ſervant of the public*; he is appointed by letters patent, and his ſalary is paid out of the public money; ſo, the deputy forters, and all the other inferior officers ſubordinate to the Poſt-maſter General, are the *ſervants* of the *public*, though nominated by *him*. This is apparent from a variety of circumſtances. 1ſt, It is a clear principle, that whoever holds an office which renders him reſponſible for any act done in it, ought to have the entire management and controul of ſuch office. If reſponſible for the acts of his ſervants, he *alone* ought to have the *privilege* of *appointing* them, upon his own terms, and at his own diſcretion; and

* *Vide ſect.* 35. 38. 42.

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and with as abſolute a power over them in every reſpect, as he has over the ſervants of his own houſe. On the contrary, the Poſt-maſter in this caſe can neither fix the poſts, nor the rate of poſtage of letters, nor receive the revenue ariſing from it; but parliament alone has the right to ſettle the one, and the Receiver-General is entruſted with the other. 2d, With reſpect to the inferior officers to be appointed, the power given him by the letters patent, is not a general power of appointing ſervants; but the offices are all ſeparately and diſtinctly ſettled by name. Neither the perſons to be hired, nor the terms of their ſervice, are at the diſcretion of the Poſt-maſter: But both are to be approved of by the Treaſury. Even the ſecurity they are to enter into, and which alone could be the means of the Poſt-maſter being indemnified in caſe of a loſs, is not given to *him*, but to the *King*. Another material circumſtance is, that by the ſtat. 9 *Ann.* c. 10. they are required to take the oaths of allegiance and ſupremacy. This ſhews the act itſelf conſiders them as *public officers*, not as mere deputies of the Poſt-maſter. All public officers *muſt* take the oaths; But it is no neceſſary qualification of a private ſervant. No maſter ever requires his ſervant to take the oaths; nor is it here left to the diſcretion of the Poſt-maſter to require it; but *enjoined* by the ſtatute. Theſe conſiderations are amply ſufficient to mark the diſtinction between the office of the defendants, and one, which would render them liable for any act done in it, or for the acts of their ſervants. 3d, Many of theſe conſiderations are equally applicable to ſhew, that the analogy between the defendants and a common carrier, to whom they have been compared, does not hold. A common carrier fixes his own price; he *may*, and generally does, vary it according to the *value* of the thing to be carried, though of equal ſize and weight: Whereas the poſtage of letters is *fixed*, and cannot be varied according to the value.—A common carrier appoints his own ſervants: If any ſecurity is neceſſary, he takes it to *himſelf*. If he is guilty of *embezzlement*, it is only a *breach of truſt*: In the *Poſt-maſter* or his *ſervants*, it is a *capital felony*.—Beſides, in ſuch a caſe, the *treſpaſs is merged* in the *crime*: Therefore, upon that ground alone, the plaintiff is not entitled to recover. 4th, But, independently of reaſoning or principles, the caſe of *Lane* v. *Cotton*, 1 *Ld. Raym.* 646. is an authority by which the court is bound. It is a ſolemn judicial deciſion, and has ſtood uncontroverted for near a century. Several acts of parliament have been ſince paſſed, as well for a new eſ-

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tabliſhment of the Poſt-office, as for different regulations which it has been thought expedient to make: And yet at no time has any application been made to redreſs the grievance now complained of, by altering the law, nor has any action been brought to impeach the propriety of that deciſion. On the contrary, the ſtat. 9 *Ann. c.* 10. and the other ſubſequent ſtatutes are a legislative confirmation of its authority. As to the note at the end of Lord *Raymond*'s report, ſignifying, that upon a writ of error brought, the Poſt-office paid the money, it would be totally immaterial if true, unleſs done upon proper and legal advice; but the fact is, that no trace of any ſuch payment can be found in the Poſt-office, or of any ſuch writ of error being brought*. The concluſion is, that the information given to Lord *Raymond* was not founded: And it is obſervable that no other reporter takes any notice of it.—For theſe reaſons it was ſubmitted that the action did not lie.

For the plaintiff, *contra*, it was ſaid, that to form a judgment of the ſubject matter in queſtion, it was material to attend to the ſtate of circumſtances, *antecedent* to any regulation for the eſtabliſhment of a *General Poſt-office*, to ſee what were the rights and powers of the ſubject, prior to ſuch regulation. The firſt ſtep towards erecting a Poſt-office was by an ordinance of *Cromwell*; *Scobell*'s acts, 1656, *page* 511. Prior to that ordinance, every body was at liberty to ſend their letters, containing bills of exchange or any other valuable property, by any mode of conveyance they might think proper; there being no law that prohibited one perſon to ſend, or another to carry, or that regulated the compenſation to be given or received, for the poſtage or delivery of any ſuch letter, &c. But it was part of the *legal liberty* of the ſubject, to *employ whom he pleaſed*, and exerciſable at his diſcretion. Motives of public convenience were the *principal* inducement to the eſtabliſhing a General Poſt-office; at the ſame time, it was no inconſiderable object of *Cromwell*'s ordinance to prevent *conſpiracies*, by ſubjecting the general correſpondence of the kingdom to the inſpection of perſons appointed to the management of this new branch of revenue: And ſo it is ſtated in the ordinance itſelf. Antecedent to this ordinance, and to the ſtat. 12 *Car.* 2. *c.* 35. there could be no doubt but that whoever truſted his money or effects to another, and paid him for the conveyance of them, had his remedy by action, in caſe

* Lord *Mansfield* upon the firſt argument directed an enquiry to be made at the Poſt-office, whether they had any entry or minute of the payment alluded to, and alſo whether any writ of error was brought.

of a loſs, whether occaſioned by the negligence of the party employed, or by that of his ſervants. It was but was reaſonable therefore, as well as juſt, ſeeing the immenſe profit ariſing from this parliamentary monopoly, that government ſhould ſtand in the ſame predicament as thoſe, whoſe office they had engroſſed entirely and *excluſively* to themſelves. Clearly, there was nothing in the ſtat. 12 *Car.* 2. *c.* 35. or any other ſtatute relative to this ſubject, importing that the *condition* of the *ſubject* ſhould be *worſe* than it was *before*. On the contrary, the proviſions the ſtatutes contain, are declared to be for the *benefit* of the ſubject. By the ſtat. 12 *Car.* 2. power is given to the King alone, "to grant this office at ſuch *rent* as he ſhall think fit." And in giving judgment in the caſe of *Lane* verſus *Cotton*, 1 Lord *Raym.* 646. it ſtruck one of the judges* as an abſurdity too great to be contended for, that if the revenue were *farmed*, the *perſon farming it* would not be liable. But the difference he takes is, that this office, being an eſtabliſhment by act of parliament, is *founded in government*, and therefore that the officers belonging to it are abſolved from the common obligations of juſtice. That cannot be. Wherever plain and manifeſt obligations of juſtice are to be contravened, it is very eaſy for the legiſlature to expreſs ſuch their intention in preciſe and unequivocal terms; otherwiſe, every project of individuals ſanctioned by an act of parliament, would draw the ſame dangerous conſequences along with it. In acts for making navigable rivers, no reference is had to the law that is incident to the caſe of common carriers: But whoever is employed to carry the goods of the ſubject on ſuch rivers, is liable to anſwer for their own or their ſervants' negligence. It is a principle of obvious juſtice that obtains univerſally. The duty ariſes out of the truſt: And much more ſtrongly in the preſent caſe; where, for the expreſs purpoſe of greater ſecurity, the general right and liberty of the ſubject is ſo extremely narrowed. But the propoſition contended for on the other ſide goes to make it leſs ſecure, by ſaying, that this is a direct prohibitory law, by which the ſubject ſhall be *bound* under a penalty to truſt his property to particular perſons, *excluſively* of all others, and nevertheleſs, that ſuch perſons ſhall in no caſe whatſoever be anſwerable for the care of it. 2*dly*, As to the objections made to the plaintiff's right of action as againſt the defendants, the *firſt* is, that this is no *perſonal* default in them; but if any, a conſtructive neglect only, by the miſconduct of their ſervant. The anſwer to that is,

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* *Gould* Juſtice. 1 Ld *Raym.* 650.

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that in every undertaking, whether public or private, the maſter is liable for the acts and miſconduct of his ſervants, equally the ſame as he is for his own. If he were not, every maſter muſt neceſſarily turn labourer and be his *own* ſervant, for no one would truſt the mere mechanic.—Suppoſe a ſervant of the bank were to transfer any perſon's ſtock without his leave: Would not an action lie againſt the governors of the Bank? But 2. it is *objected*, that *Michell* was not the defendant's ſervant, but the ſervant of the public.—*Anſwer*. The words of the act are, "that the Poſt-maſter and his deputies, &c. by "him employed, ſhall have the receiving, carrying, &c. of let-"ters, and *no one elſe*." Beſides, the ſpecial verdict finds in ſo many words "that *Michell* was appointed by the defendants perſon-"ally." It would be ſingular, therefore, to ſay, that he was not their ſervant, but the ſervant of the public.—3. The *next* objection is, that all the inferior officers appointed under the act, are required to take the ſacrament, and alſo an oath for the due and faithful execution of their truſt; and therefore they are to be conſidered as public officers perſonally liable, though nominated by the Poſt-maſter. *Anſwer*, That it is only for greater ſecurity, and not alone ſufficient to exempt the defendants by whom they are appointed.—4. It is ſaid, that the inferior officers continue in their ſituations, though the Poſt-maſter is diſplaced. *Anſwer*, Poſſibly that may be ſo, becauſe where no objection lies, there is no reaſon why they ſhould be removed. But whether they can retain their office againſt the conſent of the ſucceſſor, is a very different queſtion. The office itſelf is only *during pleaſure*. It cannot be therefore that ſuch a perſon can have a right to communicate to his deputies a higher intereſt than he enjoys himſelf.—5. The next objection is as ill founded; That the loſs imputed to the negligence of the defendants, is by the ſpecial verdict found to be a loſs by the *felony* of *Michell*, who has ſuffered death for it: Therefore, no action lies, the treſpaſs being merged in the felony. *Anſwer*, That might have been ſo if the action had been brought againſt the *offender* (*Michell*) himſelf. Becauſe it would be of miſchievous conſequence to let private ſatisfaction interfere with public juſtice. But was it ever yet ſaid, that the felony of the ſervant ſhall excuſe the negligence of the maſter?—6. The principal objection relied on is this: That the revenue is raiſed for the uſe of the King and the public, and that the ſecurity given by *Michell*, as well as by all other inferior officers, was given to the King, and not to the de-

fendants.—*Anſwer*, In the firſt place, the law takes no notice of this ſecurity: But it is a mere condition inſerted in the letters patent, with which the ſubject has nothing at all to do; for the act ſays not a word about it. It authorizes the Poſt-maſter to appoint deputies and ſubordinate officers: But impoſes no reſtriction upon his diſcretion in ſo doing. The recognizance to the crown, which is the mode of ſecurity, is obviouſly taken for the ſake of a ſpeedier remedy to the crown in all caſes of embezzlement or miſconduct, affecting its own intereſt, againſt thoſe who enter into it. But the Poſt-maſter General has an ample ſalary ſufficient to anſwer all loſſes of the ſubject, occaſioned by the negligence or other miſconduct of himſelf or his ſervants; which alone renders him liable. *Morſe* v. *Slue*, 1 *Vent.* 190. 238. If it is not ſufficient, it is his own fault for accepting it as ſuch. But it is not clear that he may not reimburſe himſelf out of the fund; at leaſt, it is much better that the public ſhould occaſionally pay a ſmall ſum out of the revenue, than that private individuals ſhould ſuffer, and the property ſent by this mode of conveyance be rendered totally inſecure. It would not be difficult however to maintain, that the action would lie even if the defendants had no ſalary at all. Lord *Coke* in 1 *Inſt.* 89. *a.* ſays, "If a guardian receive the profits of land and be robbed, if it "be without his default or negligence, he ſhall be diſcharged "therefrom: But otherwiſe it is of a *carrier*; for he has his "hire, and undertakes *implicitly* for the *ſafe delivery* of the goods "entruſted to him."—And ſubſtantially there is no difference between the defendants and a common carrier. With reſpect to the caſe of *Lane* v. *Cotton*, 1 Lord *Raym.* 646. it is ſaid, no notice is taken in any reporter, except Lord *Raymond*, of the final iſſue of that caſe. But *Peere Wms.* in a note, *vol.* 3. *page* 394. confirms the account given by Lord *Raymond*. Mr. *Lee* farther ſaid, the authority which weighed moſt with him, was the information he had received from Sir *Thomas Parker*, who had authorized him to ſay, that being in the early part of his life very intimately acquainted with Lord Chief Juſtice *Willes*, who married a niece of the plaintiff *Lane*, the Chief Juſtice told Sir *Thomas*, that *Lane* had informed him the money was paid. On the other hand it is true, that ſearch has been made in the *Exchequer* to know if any writ of error was brought, and none ſuch is to be found; nor is there any entry in the Poſt-office of the money being paid,

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Lord MANSFIELD.—I fancy, if ever it was paid, there was no entry of it.

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Laſtly, Many of the reaſons given by the three judges who were for the defendants in that caſe, went on this ground; that it never was the intention of the legiſlature that valuable property, but that mere miſſive letters only, ſhould be ſent by that mode of conveyance. But in the ſtat. 6 *Geo.* 1. *c.* 21. *ſect.* 52. it is provided, that all bills of exchange, *&c.* except ſuch as are ſent abroad, ſhall be paid for as ſo many ſeveral letters.—Upon the whole, therefore, they ſubmitted that this action was clearly maintainable.

Lord MANSFIELD.—Upon the laſt argument we were all fully ſatisfied; but from the nature and importance of the queſtion, I was deſirous of having the opinion of Mr. Juſtice *Aſton*, whoſe loſs cannot be too much lamented: We had the advantage of his aſſiſtance; for a note of what paſſed was read over to him, and he was entirely of the ſame opinion.

I ſhall conſider this queſtion in *two lights*.—1. As it ſtood in the year 1699, before the determination of *Lane* verſus *Cotton*. 2. As it ſtands now, ſince that determination; and alſo, what has been done in conſequence of that deciſion. And *firſt* as it ſtood in the year 1699.—The Poſt-office, as Mr. *Lee* has truly ſaid, was firſt erected during the uſurpation, by an ordinance of *Cromwell*, and afterwards more fully regulated by the ſtat. 12 *Car.* 2. *c.* 35. There never had been any action brought, either upon that ordinance or upon the ſtatute, till the caſe of *Lane* verſus *Cotton*; and the ſame mode of action that is now brought, was the mode fixed upon in the caſe of *Lane* verſus *Cotton*. But neither from the draught of the declaration by the adviſers of that action, nor in the opinion of the judges upon the queſtion, does it appear to have entered into the imagination of either, that this was a *demand upon the fund*, as it has been now argued; for the *form of action* is not applicable to ſuch a demand. If there could be a demand upon the fund, it muſt be by a totally different form of action. But this is a demand upon the *Poſt-maſter perſonally*, upon the ground of a neglect in him by his own act, or *conſtructively* ſo, by the fault of his ſervant. If the fund were in the nature of a policy of inſurance to inſure every man who ſends bills or notes by land or ſea carriage, from a loſs by robbery or neglect, ſuch contingency would be a deduction out of the fund; and no doubt in that caſe, if a loſs were to happen, upon an action brought againſt

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the proper officers they would be liable; being bound by the positive conſtitution of the office to inſure every perſon, for the fixed and eſtabliſhed rate of poſtage. But here, the act of parliament has *appropriated* the *whole revenue*. Therefore if a loſs is paid, there muſt be an *item* of it; and that *item* muſt come *under* the *appropriation*. But it is manifeſt no ſuch idea was ever thought of at the time. If it had been thought of, the ordinance of *Cromwell*, or the act of parliament would in terms have charged the fund for all loſſes ariſing from neglect or otherwiſe.

But neither this action, nor the caſe of *Lane* verſus *Cotton*, is founded upon the ground of the *fund* being *liable*. What then is the ground? It is, that the Poſt-maſter in conſequence of the *hire* he receives, is liable for all the damage that may happen, whether owing to the negligence or diſhoneſty of the perſons employed under him, to conduct and carry on the buſineſs of the office. If that poſition were founded in the extent in which it has been ſtated, it would go the length of making the defendants liable in *all caſes* whatſoever. But the argument of Lord Chief Juſtice *Holt*, who differed from the other judges in the caſe of *Lane* verſus *Cotton*, does not extend ſo far as that; for he takes a *difference* between the caſe of a letter *loſt in the office* by a ſervant employed under the Poſt-maſter, and that of a *loſs upon the road*, or by the *mail* being *robbed* after the letter has been ſent ſafe *out* of the office. The ground of Lord Chief Juſtice *Holt*'s opinion in that caſe, is founded upon comparing the ſituation of the Poſt-maſter to that of a common carrier, or the maſter of a ſhip taking goods on board for freight. Now, with all deference to ſo great an opinion, the compariſon between a Poſt-maſter and a carrier, or the maſter of a ſhip, ſeems to me to hold in no particular whatſoever. The Poſt-maſter has *no hire*, enters into *no contract*, carries on *no merchandize* or *commerce*. But the Poſt-office is a *branch of revenue*, and a *branch of police*, created by act of parliament. As a branch of revenue, there are great receipts; but there is likewiſe a great ſurplus of benefit and advantage to the *public*, ariſing from the fund. —As a branch of police, it puts the *whole* correſpondence of the kingdom (for the exceptions are very trifling) under government, and entruſts the management and direction of it to the crown, and officers appointed by the crown. There is no analogy therefore between the caſe of the Poſt maſter and a common carrier.—The branch of revenue and the branch of police

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police are to be governed by different officers. The ſuperior has the appointment of the inferior officers; but they give *ſecurity* to the *crown*. One requiſite is, that they ſhall *take the oath* taken by all *public officers*: Another ſtrong guard is, that they are made ſubject to heavy penalties; and this is carried ſo far, that, what in the caſe of a *common carrier*, or any other perſon, would be only a *breach of truſt*, is in *them* declared to be a *capital felony*. All theſe advantages the law provides for the ſecurity of the ſubject, in conſideration of their being obliged to ſend their letters by this mode of conveyance. But the ſtatute does not make the Poſt-maſter liable for any act done, except in one particular caſe; which is very remarkable, becauſe it makes him liable for his own fault only, (and *not* for that of his deputies,) in a caſe where it is hardly poſſible for the Poſt-maſter himſelf to be perſonally in fault. The ſtatute (*ſect.* 5.) creates a monopoly in the Poſt-maſter and his deputies or ſubſtitutes, of *providing poſt-horſes*. And if any other perſon preſumes to let to hire any poſt-horſe, for the purpoſe of carrying letters, &c. he is liable to a penalty of 5*l.* *except* where the Poſt-maſter or his deputies do not furniſh horſes within half an hour after an application made; for then the party is at liberty to hire a horſe elſewhere. And in that caſe, "if it be through *default* "or *neglect* of the *Poſt-maſter* or his *deputy*, that ſuch perſon fail of "being furniſhed with a ſufficient horſe or horſes in time, then "the *Poſt-maſter* or his deputies are to forfeit 5*l.*"

As to an action on the caſe lying againſt the party really offending, there can be no doubt of it; for whoever does an act by which another perſon receives an injury, is liable in an action for the injury ſuſtained. If the man who receives a penny to carry the letters to the Poſt-office, loſes any of them, he is anſwerable; ſo is the *porter* in the buſineſs of his department. So is the Poſt-maſter for any fault of his own. Here, no perſonal neglect is imputed to the defendants, nor is the action brought on that ground; but for a *conſtructive* negligence only, by the act of their ſervants. In order to ſucceed therefore it muſt be ſhewn, that it is a loſs to be ſupported by the Poſt-maſter, which it certainly is not. As to the argument that has been drawn from the ſalary which the defendants enjoy; in a matter of revenue and police under the authority of an act of parliament, the ſalary annexed to the office, is for no other conſideration than the trouble of executing it. The caſe of the Poſt-maſter, therefore, is in no circumſtance whatever, ſimilar to that of a common

common-carrier; but he is like all other public officers, such as the Lords Commiſſioners of the Treaſury, the Commiſſioners of the Cuſtoms and Exciſe, the Auditors of the Exchequer, *&c.* who were never thought liable for any negligence or miſconduct of the inferior officers in their ſeveral departments. 1778. WHITFELD *verſus* Lord LE DESPENCER.

Thus then the queſtion ſtood in the year 1699. In that year a ſolemn judgment was given, that an action on the caſe would *not* lie againſt the Poſt-maſter General, for a loſs in the office by the negligence or fault of his ſervant. The nation underſtood it to be a judgment: And therefore it makes no difference, if what has been thrown out were true, and the writ of error was ſtopped in the way that has been mentioned. For the bar have taken notice of it as a judgment; the parliament and the people have taken notice of it, every man who has ſent a letter ſince has taken notice of it; many acts of parliament for the regulation and improvement of the Poſt-office, and other purpoſes relative to it, have paſſed ſince, which by their ſilence have recognized it. The mail has been robbed a hundred times ſince, and no action whatever has been brought. What have merchants done ſince and continue to do at this day, as a caution and ſecurity againſt a loſs? They cut their bills and notes into two or three parts, and ſend them at different times: one, by this day's poſt, the other, by the next. This ſhews the ſenſe of mankind as to their remedy. If there could have been any doubt therefore before the determination of *Lane* verſus *Cotton*, the ſolemn judgment in that caſe having ſtood uncontroverted ever ſince, puts the matter beyond diſpute. Therefore, we are all clearly of opinion the action will not lie.

Per Cur. Judgment for the defendants.

HARE *verſus* CATOR.

Same day.

IN covenant the plaintiff declared againſt the defendant as *aſſignee* of *all* the eſtate, right, title, and intereſt in certain premiſes by her demiſed to Lord *Bolingbroke*. The defendant pleaded, that the eſtate, right, title, and intereſt of the ſaid Lord *Bolingbroke*, to the ſaid demiſed premiſes in the declaration mentioned, did not come to his poſſeſſion by aſſignment, as in the ſaid declaration alleged: And thereupon iſſue was joined.

Declaration againſt the defendant as aſſignee of *all the eſtate, &c.* in certain premiſes: Evidence that he is aſſignee of *part only* is a *fatal variance.*

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The cauſe came on to be tried at *Weſtminſter*, before Lord *Mansfield*, at the Sittings after *Michaelmas* Term, 1777, when the jury found a verdict for the plaintiff, damages 1,750 *l.* coſts 40*s.* ſubject to the opinion of the court upon a caſe, ſtating in ſubſtance as follows: The marriage ſettlement of Lord *Bolingbroke*, dated *November* 4th, 1765, by which certain premiſes conſiſting of the manor of *Beckenham*, and *eleven farms* in *Kent*, and other eſtates of the yearly value of 3,250 *l.* of *which the premiſes in queſtion were part*, were conveyed to truſtees to the uſe of Lord *Bolingbroke* for life, with remainders over: with a power to Lord *Bolingbroke* to leaſe, *&c.* and alſo a further power with the conſent of the truſtees to revoke the uſes of the ſaid ſettlement. 2. That by indenture of the 24th *July* 1770, Lord *Bolingbroke*, for the conſideration there mentioned, demiſed the *eleven farms* in *Kent*, *and a meſſuage or tenement in Peckham*, in the county of *Surrey*, to the plaintiff for 99 years, if he the ſaid Lord *Bolingbroke* ſhould ſo long live, at a pepper-corn rent. That by indenture, 25th *July* 1770, the plaintiff re-demiſed all the ſaid premiſes to Lord *Bolingbroke*, at the yearly rent of 500 *l.* for the term of 98 years and 11 months, if the ſaid Lord *Bolingbroke* ſhould ſo long live. Then it ſet out an indenture of the 20th of *October* 1773, revoking the uſes in the ſettlement. That afterwards, by *leaſe* and *releaſe* of the 21ſt and 22d of *October* 1773, made between the truſtees under the ſaid ſettlement of the one part, Lord *Bolingbroke* of the ſecond part, and the defendant of the third part, reciting the ſaid ſettlement, the revocation of the uſes, and that the defendant had contracted for the purchaſe of the *premiſes at Beckenham*, for 19,688 *l.* the ſaid truſtees in conſideration, *&c.* granted and conveyed the ſaid *manor and eſtates at Beckenham*, to the defendant, his heirs and aſſigns.——That the defendant *Cator* had *no aſſignment* of the ſaid *term of* 99 *years*, granted by Lord *Bolingbroke* to the plaintiff, nor of the re-demiſe granted by the plaintiff to the ſaid Lord *Bolingbroke*.—That it appeared by the evidence there given for the plaintiff, that the defendant had notice of the annuity granted to the plaintiff, and of the manner in which it was ſecured, before he completed his purchaſe. And that the price paid by the defendant *Cator* for the purchaſe of the ſaid eſtate, was not beyond a fair and adequate price, on a ſuppoſition of the eſtate being bought ſubject to the payment of the annuity granted to the plaintiff. The defendant's counſel objected to the *form* of the action, by reaſon that the *eſtate in Surrey*, let at 110 *l.* *per ann.*

ann. compriſed in the re-demiſe from the plaintiff to Lord *Bolingbroke*, was *not purchaſed* by the defendant. The queſtion for the opinion of the court was, Whether the action might be maintained? If the court ſhould be of opinion that the action could be maintained, then a verdict to be entered for the plaintiff, damages 1,750*l.* and coſts 40*s.* But if the court ſhould be of opinion, that the action could not be maintained, then a nonſuit to be entered. 1778. HARE *verſus* CATOR.

This caſe was argued by Mr. *Morris* for the plaintiff, and by Mr. *Davenport* for the defendant; and ſeveral points aroſe. 1. Whether under the circumſtances of the caſe, the defendant was aſſignee at all? 2. If aſſignee, Whether, as being aſſignee of part only, he was liable for the whole, or only an apportionment of the rent? 3. Whether the action could be ſupported in point of form; the declaration charging that the defendant was aſſignee of the whole, whereas by the evidence it appeared he was aſſignee of part only?—Mr. *Morris* for the plaintiff contended, that the rent being reſerved upon all and every part of the premiſes, the defendant was clearly liable for the whole rent, though aſſignee of part of the premiſes only: And for this he relied on the caſe of *Broom* verſus *Hoare*, *Cro. El.* 633. As to the objection in point of form, he ſaid, that though the declaration was more large than the truth of the caſe would warrant, the plaintiff was equally entitled to recover upon what did appear in proof.

Mr. *Davenport* for the defendant *contra*, ſaid, he ſhould confine himſelf to the objection in point of form, Whether the defendant being charged as aſſignee of the whole, proof of his being aſſignee of part only was ſufficient; and he contended it was a fatal objection. But if it were neceſſary to go into the other points, it would be ſufficient to obſerve, that the caſe of *Broom* v. *Hoare*, did not at all apply to the preſent: For there the defendant was the *original leſſee*, who had aſſigned part of the premiſes, and continued in poſſeſſion of the remainder; and no doubt, as againſt the *original leſſee*, debt will lie for the *whole* rent, though he retain only *part* of the premiſes; becauſe of the *privity of contract*. But an aſſignee is liable only from the *privity of eſtate*: conſequently, muſt be charged according to *the truth of the caſe*; which here is, that he is aſſignee of *part* only. Therefore, he prayed a nonſuit might be entered.

The court gave no opinion upon the point, Whether the defendant was aſſignee; but determined upon the objection in

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point of form that the defendant was *improperly* charged as aſſignee of the *whole*, againſt the truth of the caſe; being, if at all, aſſignee of *part* only. Accordingly, a nonſuit was entered.

Monday, May 11th.

BOLDERO *verſus* GRAY.

Practice. Where the defendant is guilty of a neglect in not putting in bail in time, whereby the bail bond becomes forfeited, the plaintiff may *except* to bail put in, in order to ſtay the proceedings on the bail bond, and it will *not* be a waver of the *aſſignment*.

UPON ſhewing cauſe why the proceedings on the bail bond in this caſe ſhould not be ſtaid with coſts, the facts appeared to be, that the writ was returnable on the 27th of *January*. A ſummons was taken out for time to put in bail: The defendant's attorney ſwore he attended a little after ſix o'clock, that he continued till *paſt ſeven*; and was *not informed* any perſon attended, upon which he took out another ſummons for the next day.—The plaintiff's attorney ſwore he attended: Enquired of the clerk if any perſon attended for the defendant, and was *told no one attended*: Upon which he took an aſſignment of the bail bond. The defendant then took out an order for ſtaying proceedings, but no bail was put in above; ſo nothing could be done. On the 31ſt there was another attendance, when it was alleged no bail was put in, the bail put in being at the ſuit of the plaintiff, *aſſignee* of the ſheriff of *Middleſex*, which was not this action.

Mr. *Wallace* in ſupport of the rule inſiſted, that, after regular bail put in, if the plaintiff excepts to them, it is a waver of the proceedings on the bail bond. [*N. B.* This was allowed by the *Maſter*, and agreed to be the *univerſal practice*.] On the other hand, this practice was objected to, as a ſerious hardſhip upon the plaintiff, by forcing him, if he *did except* to the bail above, to wave the benefit of the bail bond; and if he did *not* to be put off with bad bail, in caſe the proceedings upon the bail bond were ſet aſide. The court thought the objection very forcible and ſtrong: And accordingly made a rule, that in future wherever the defendant is guilty of a neglect, in not putting in bail in due time, by which the bail bond becomes forfeited, the notice (in caſe the party means to put in bail in order to ſtay proceedings upon the bail bond) ſhould be, that he will put in and *perfect* bail on ſuch a day, analogous to the caſe where the ſheriff is ruled: who, before he can diſcharge himſelf, muſt give notice that he will put in and perfect bail: And in that caſe the plaintiff may oppoſe the bail in court, without its being a waver of the bail bond.

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RICHARDS, *qui tam, versus* BROWN.

Tuesday, May 12th.

Willes, Justice, absent, in *Canc.*

Where more than 5 *per cent.* is taken, if the *substance* of the contract be a *borrowing and lending*, a slight *colourable contingency* only, will not take it out of the statute of usury.

UPON shewing cause why a new trial should not be granted, the case, as it appeared from the report of Lord *Mansfield*, was in substance as follows: This was an action on the statute of usury, in which the declaration stated, that on the 28th of *October* 1773, the defendant, upon a corrupt bargain, received 35*l.* from one *Heighway*, for the forbearance of 420*l.* from the 20th of *December* 1772, to the 20th of *June* 1773. At the trial, *Richard Heighway*, who was the borrower of the money, and the only witness as to the transaction, said, that he borrowed of the defendant 200*l.* in the year 1769, which was settled six months after. That on the 5th of *September* 1770, he applied to the defendant to *lend* him 600*l.* saying, he was owner of 2,042*l.* Bank annuities vested in trustees, to be transferred to him upon making out his title to an estate which was very clear; and shewed *Brown* the declaration of trust. The defendant said, he would *lend* him 600*l.* or 1000*l.*; and supplied him with 200*l.* for which *Heighway* gave him a bond, and deposited the declaration of trust as a collateral security; and *Brown promised* he should have the *remaining* 400*l.* in a *fortnight's time*. On the 17th of *September* *Heighway* called for the other 400*l.*: the defendant then told him "money was very scarce, upon the prospect of a *Spanish* war."—*Heighway* pressed him very much; upon which he said, he would see what could be done, and bid him call the next day. *Heighway* did so in the morning, but the defendant was not at home. He called again in the evening, who then saw *Brown*, who said he was afraid he could not raise it himself, but would try to get it of a friend in the city, who never was without money; but he was a *very hard man*. *Heighway* asked what his terms were. The defendant said, they were so exorbitant he was almost ashamed to name them. *Heighway* said he would rather pay 20. or 30 guineas than not have the money. The defendant said, his friend was not so hard as that; but that he never *lent money, but* upon *annuity* at 6 *years* purchase: However, said the defendant, "if you will take the money on "those terms, I will engage to furnish you with money to re-"deem in *three* months time. The quarter's annuity will come "but to 17*l.* 10*s.* which will be better than giving 20 or 30 "guineas." This being agreed to, on the 20th of *September* 1770,

Heighway

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Heighway called upon *Brown* for the money, and found a bond and warrant of attorney, *&c.* prepared for ſecuring an annuity from him to one *Waters*. *Heighway* executed it; and *Brown* ſigned it as the ſubſcribing witneſs. After the bond was executed, *Brown* ſaid, he was always uſed to have 5 *l. per cent. procuration money;* but as *Heighway* was diſtreſſed, he would only take *two and a half per cent.* and accordingly took 15 guineas, and *Heighway*, left the declaration of truſt with him. *Heighway* ſaid, "the *defendant firſt propoſed* an *annuity*: He *himſelf would* "*not have granted one.*" When the firſt quarter's annuity was due, *Heighway* applied to the defendant, and preſſed him for money to redeem, as he had promiſed. *Brown* refuſed. He then aſked for the declaration of truſt; the defendant ſaid, if he inſiſted upon it, *Waters* would enter up judgment. *Heighway* inſiſted upon it; and judgment was entered up. *Heighway* paid the *defendant one year* and *one quarter's annuity*, and one quarter to the defendant's partner. The defendant often denied that he had promiſed *Heighway* money to redeem; and ſaid he wondered how he could expect him to lend money at 5 *per cent.* when others made 16 and half *per cent.* of their money. Afterwards *Brown* acknowledged he was himſelf the *principal* that advanced the money, and enjoyed the annuity; and ſaid, that Mr. *Waters*, whoſe name had been made uſe of, was his truſtee.—*Waters* † ſwore that the defendant had ſometimes purchaſed annuities in his name, but that he knew nothing of *this*.—I told the jury, if they were ſatisfied that in the true contemplation of the parties, this tranſaction was a purchaſe by the one, and a ſale by the other, of a real annuity, how much ſoever they might diſapprove of or condemn the defendant's conduct, they muſt find a verdict for him. But, on the contrary, if it appeared to them to have been in reality and truth the intention of both parties, the one to *borrow*, and the other to lend; and that the form of an annuity was only a mode forced on the neceſſity of the borrower by the lender, under colour of which he might take an uſurious and exorbitant advantage, then they might find for the plaintiff, notwithſtanding the contingency of the annuitant dying within three months; more eſpecially, as it was underſtood by both, that the annuity, at the expiration of three months, was to aſſume the direct ſhape of a loan.—The jury afterwards came to my houſe, where they ſaid, they agreed with me in deteſting the tranſaction, but they thought *there was*

† *N. B.* He was *ſubpœnaed* by the defendant, but examined by Lord *Mansfield*'s order.

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an annuity. I repeated my former direction to them; they retired again, and at length found for the *plaintiff*.—On *Thursday* and *Saturday* the 5th and 7th of *February* in *Hilary* Term last, Mr. *Wallace*, Mr. *Buller*, Mr. *Dunning*, and Mr. *T. Cowper*, shewed cause against the rule, and Mr. *Mansfield* argued in support of it. 1778. RICHARDS *versus* BROWN.

On the part of the plaintiff the counsel stated the question to be, Whether the evidence given at the trial amounted to proof of a loan? for if it did, no shift or contrivance, no risk or chance, could take it out of the statute; and they contended, that clearly and manifestly upon the face of the transaction, it imported a *loan*; and that the form of an annuity, under which it was disguised, was merely a contrivance to evade the statute. 1. The application by *Heighway* was expressly and in terms an application for a *loan*. The defendant actually advanced part of the money at the time; and promised to *lend* him the remainder in a fortnight. The subsequent treaty for the remainder, on the part of *Heighway*, was clearly for a *loan*; and the proposal of turning it into an annuity came from the defendant. But even at that time, the idea of its being a *loan* was so strong in *his* mind, as well as in that of the plaintiff, that the answer he gives the plaintiff is, that "his friend never *lends money, but* in "the *form of annuity*;" *not*, that he *never lent money*, but *only dealt in the purchase of annuities*, or any declaration of that kind, which might shew he would not be concerned where the transaction was to be a loan. But whether a transaction is a loan or not, is a matter that depends upon the intention of the parties; therefore, clearly proper for the jury: and here, they have found that the transaction was a loan. If so, the risk of the borrower dying within three months, will not prevent its being usury. It is true, this is a case upon the statute: But the old cases go upon the same principle. They are all collected in the case of Lord *Chesterfield* versus *Janssen*, 1 *Atk.* 301. to 355. and they all agree, that the material point to be considered is, whether there is a *communication for a loan of money*. 4 *Leon.* 208. *Fuller's* case.—*Cottrell* v. *Harrington*, 1 *Brownlow*, 180. *The King* versus *Drury*, 2 *Lev.* 7. S. P. If the real substance is a loan, a *small risk* will not take it out of the statute. In *Clayton's* case, 5 *Co.* 70. an agreement to pay 33 *l.* for the loan of 30 *l.* from the 6th of *December* to the 2d of *June* following, *if the borrower should then be alive*, was held *usurious*, for the reason given by *Popham*, Chief Justice, in *Burton's* case, 5 *Co.* 69. *that*

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if it ſhould be out of the ſtatute for the *uncertainty of the life*, the ſtatute would be of *little effect*. *Burton* verſus *Downham*, *Cro. Eliz.* 642. S. P. *Ibid.* 741. *Beddington* verſus *Aſhley*, S. P. *Roberts* verſus *Tremayne*, *Cro. Jac.* 507. S. P. *Maſon* verſus *Abdy*, *Carthew*, 67. S. P. Perhaps the caſe of *Murray* verſus *Harding*, 3 *Wilſ.* 390. may be cited *à contra*; but there, the court expreſsly decided upon its being a *purchaſe*, and not a *loan*. The *grantee* of the annuity having never been ſpoken to about *lending*.—Laſtly, in the caſe of Lord *Cheſterfield* v. *Janſſen*, 1 *Atk.* 301. to 355. all the above authorities were weighed and confirmed. Mr. Juſtice *Burnet* there ſays *, "If "a man *purchaſe* an *annuity* at ever ſuch an *under price*, if the "bargain was *really* for an *annuity*, it is *not uſury*. If on the "foot of *borrowing* and *lending*, it is *otherwiſe*; for if the court are "of opinion, the annuity is *not* the *real contract*, but a *method* of "paying *more money* for the reward or intereſt *than the Law allows*, "it is a *contrivance* that ſhall not avoid the ſtatute, by giving the "avarice of one kind of men, an opportunity of preying on the "neceſſities of another." And the caſe put by Lord *Hardwicke*, in giving his opinion upon the ſame queſtion, is preciſely this very caſe. "A man," ſays his Lordſhip, "may purchaſe an an-"nuity on as low terms as he can: but *if he ſets out* with *bor-"rowing* a ſum of money, and *then turns it into* the *ſhape of an "annuity* afterwards, this is a *ſhift* and an evaſion to avoid the "ſtatute." Here, the original application and the ſubſequent treaty were for a loan, and nothing elſe. Then the defendant propoſes to change it for an annuity. That was a mere ſhift to evade the ſtatute; the man was in perfect health; little or no chance of his death, ſo as to create any thing more than a mere colourable riſk, and the intention of the defendant was only to avoid the penalty of the law. Therefore, they prayed the rule for a new trial might be diſcharged.

Mr. *Manſfield contra*, in ſupport of the rule, began by obſerving upon the teſtimony of the witneſs *Heightway*, upon whoſe evidence alone the tranſaction reſted; and which, he ſaid, was tinctured with very ſuſpicious circumſtances indeed. At firſt, he ſwore that *Johnſon*, who was his partner, was the ſole attorney in the cauſe: That *Johnſon* died at *Michaelmas* 1776. Then that *May*, who was clerk to him and his partner, was the *ſole* attorney; that he himſelf was *not* the *attorney*, nor *intereſted* in the cauſe. That no ſteps were taken in the cauſe during *Johnſon*'s life, whereas there was a notice of trial and a counter-

* 1 Atk. 330.

mand,

mand, which he must have known. *That* alone, therefore, is a ground for sending the matter to a second enquiry. 2. As to the question of law; it is said, this is not a fair *bonâ fide* communication for the *purchase* of an annuity, but a mere *contrivance* to get more than legal interest. As to that, he said, he agreed, if it were a mere contrivance to get more than legal interest *by way of loan*, it would be usury; for the true distinction certainly is, whether the transaction be real, or colourable only. But if the contract is for a *real* annuity, however unfair or even grossly foul, the bargain may be on the part of the grantee, in taking advantage of the necessities and distress of the grantor, still it will not be usury. What then is the transaction here? Not a *contrivance* to disguise a *loan* under colour of an annuity; but to *force Heighway* into *granting* an *annuity*, when he wanted to have a *loan*. That may be extortion and oppression; but still it is a real annuity, and no loan; consequently, not within the statute. But it is said, there was a communication, and an *absolute agreement* to *borrow*, entered into; and therefore, its being changed into an annuity afterwards will not vary the case: And many authorities have been cited. But (after observing upon them all distinctly) he said, the result of them only proves what is not disputed, that where the transaction really is a loan, the *colour* of an annuity cannot gloss it over. But, though there be a communication for a loan at first, if the *final* agreement is *not to lend*, but for the one, to sell, and the other, to purchase a real annuity, it is not usury: And so it is expressly laid down by Lord *Hardwicke* in 1 *Atkyns*, 351. "The "substance of the agreement, and not the mere expression only, "is to decide." What then is the substance here? The accusation against the defendant is of a promise to lend, and afterwards refusing; but that he had a friend who would let him have the money upon annuity. This, *Heighway* agrees to. Is not that a bargain for a real annuity? For the loan is absolutely refused. The next ground of accusation is, that the defendant promised to *lend* him money to *redeem* the annuity. What? Redeem *that*, which it was understood by both parties *never existed!* Again, *Heighway* repeatedly applies to redeem; and complains because the defendant will not consent. He even pays the annuity from *December* 1770, to *June* 1773, *as an annuity*. All this shews, that in his own mind he was conscious the transaction and agreement was *substantially* a *real annuity*, and *not a loan*. On the other hand, What was the situation of the defendant? He could not have compelled *Heighway* to redeem; for a *liberty to redeem*,

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which is all there was in this case, is not a *contract* to redeem. Therefore, if *Waters*'s life had been suspicious, he was at the mercy of *Heighway*, whether the risk should continue or not. Upon the whole, this is manifestly no loan, nor a corrupt bargain for forbearance of the principal money: And there can be no usury by construction. The utmost that could have been done in this case, if the whole transaction had appeared in a court of Equity, would have been for the court to decree that *Heighway* should be permitted to redeem. Therefore, he prayed the rule might be made absolute.

Lord MANSFIELD.—This is a very considerable question, and I have not quite made up my mind about it: Therefore let it be set down in the paper for special argument, next Term. The question is, Whether the evidence warrants the direction I gave to the jury? Here is Lordship repeated it, (*vide supra*,) and then added, "There are three propositions. 1. The original proposal "was for a loan. 2. The mode of annuity was forced by the "defendant, the lender, upon *Heighway* the borrower. 3. At "the end of three months, *Brown* the defendant promised "to lend *Heighway* money to redeem."—*Adjornatur*.

Accordingly, on this day *, it was argued a second time by Mr. *Hargrave* for the defendant, and by Mr. *T. Cowper* for the plaintiff.

Lord MANSFIELD.—The nature of this question, the importance of it to the public and to the defendant, and tenderness to his character, made me desirous that this motion should be made; though I had no doubt of the propriety of the direction I gave the jury at the trial. We were all satisfied upon the last argument; but wished to have Mr. Justice *Aston*'s public opinion, who, upon a conference with him, entirely agreed with the opinion I shall now deliver, and so did Mr. Justice *Willes*.

The great objection at the trial was to the credibility of *Heighway*'s evidence. As to that, the *facts of the case* could be known only to him and the defendant.—With respect to his concern or interest in the present action, *Heighway* was thoroughly purged on his examination at the trial. The objections to his credit were laboured with all the strength of argument that ingenuity and ability could furnish. The jury had all these observations, without a reply. I said nothing in the summing up, that could weaken the force, or diminish the effect of them. No doubt, the *basis* of the verdict was, *his credibility*; but

* Mr. Justice *Willes* was present at the former argument, but absent upon this.

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that was left to the jury, and they have thought fit to believe him. It is observable, that the discovery of the truth of the transaction was entirely accidental. Upon that, *Brown* consents to a composition, and to accept less than the value of the annuity. Why do that, when there was no clause of redemption? There are other strong facts. Why make use of Mr. *Waters*'s name, if the transaction was fair? Why not appear, as he really was, the principal who was to lend the money. Instead of which, he appears only as a subscribing witness; makes *Heighway* believe *Waters* is the *principal*, who was an utter stranger to the whole affair; and under that pretence, takes *procuration-money* for *lending* his *own* money. If the court grants a new trial, it must be upon the ground, that *Heighway* ought not to be believed. That was a matter proper for the consideration of the jury: They had all the objections to his credibility before them, and yet were fully satisfied of the truth of what he said.

2. As to the question of law, the facts on which it arises are these:—Here, his Lordship repeated them, together with the direction he gave to the jury, (*vide supra*;) and then proceeded as follows: Now the question is, What was the substance of the transaction, and the true intent and meaning of the parties? For they alone are to govern, and not the words used. The substance here was plainly a *borrowing* and *lending*. *Heighway* had no idea of selling an annuity; but his declared object was to borrow money, and accordingly he deposited the declaration of trust, which was an ample security for the sum he wanted. He goes further, and says, "rather than not have the money "he would give 20 or 30 *l.* premium for it." *Brown* tells him, it must be *by annuity*, that his friend never *lent money* in any other shape, and that by that method, he might have it for less, (*viz.* 17 *l.* 10 *s.*) as after the first quarter he would let him have money to redeem. On the assurance that the annuity should be turned into a loan at the end of three months, the treaty proceeds. It comes out, that the defendant himself advanced the money. That alters the case entirely. If *Waters* indeed had been really the principal, this promise of *Brown* would have amounted to no more than a *promise to lend* at the end of three months. But *Brown* himself being the principal, the promise to *lend* him money to *redeem*, must be understood to be a promise to *permit* him to redeem.—It is true, there was a *contingency* during the three months. It was *that*, which occasioned the doubt; whether a contingency for three months is sufficient to take it out of the statute. As to that, the cases

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have been looked into; and from them it appears, that if the contingency is ſo ſlight as to be merely an evaſion, it is deemed colourable only, and conſequently not ſufficient to take it out of the ſtatute. Here, the borrower was a *hale* young man, and therefore we are of opinion, that there was no ſubſtantial riſk ſo as to take this caſe out of the ſtatute.

Rule for a new trial diſcharged.

Friday, May 15th.

PERY *et al. verſus* WHITE, (Leſſee of Lady VERE BERTIE,) in Error.

One deviſes his lands to his brother for life, remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of his brother in tail male ſucceſſively, remainder to his brother's daughters in tail; remainder to his *four ſiſters* and a *niece* for *their lives, ſhare and ſhare alike, as tenants in common*, and not as joint-tenants. Remainder to their ſons *ſucceſſively* in tail; remainder to their daughters in tail; *reverſion* to his *own right heirs*. And then deviſes to

THIS was a writ of error from a judgment of the Court of *King's Bench* in *Ireland*, in an ejectment brought there by the now defendant in error, to recover one undivided fifth part of an eſtate in the county of *Limerick*.

The jury found a ſpecial verdict, ſtating, "that Sir *Chriſtopher* "*Wray*, being ſeiſed in fee-ſimple of the premiſes in queſtion, "made his will on the 8th day of *July* 1710, and thereby, gave "*all his lands* to his brother *Cecil Wray*, for life, remainder to "truſtees to preſerve contingent remainders; remainder to the "firſt and every other ſon of the ſaid *Cecil Wray* in tail male, "ſucceſſively; remainder to his daughters in tail; remainder to "his *four* ſiſters, *Bridget Howard*, *Elizabeth Fitzgerald*, *Frances* "*Wray*, *Diana Twigge*, (afterwards *Diana Pery*), and a niece "of the name of *Mary Kerr*, for their *lives*, ſhare and ſhare "alike, as *tenants in common*, and not as joint-tenants; remain-"der to their ſons ſucceſſively in tail male; remainder to their "daughters in tail; the reverſion to his own right heirs." Sir *Chriſtopher Wray* died the ſame day, leaving his brother the ſaid *Cecil Wray*, (then Sir *Cecil Wray*, his heir at law, his ſiſters the deviſees, and another ſiſter, *Mary Whitaker*, for whom he made no proviſion except a ſmall annuity. Sir *Cecil Wray*, the brother, entered and made his will, and thereby diſpoſed of his eſtate to Lady *Ann Bertie*, under whom the defendant in error claimed, and died without iſſue. All the ſiſters, and the niece of Sir *Chriſtopher*, died in the lifetime of Sir *Cecil*, except *Diana Pery*, who left two daughters, *Jane Pery*, and *Ann Manſell* one of the plaintiffs in error. That *Jane Pery* is ſince deceaſed, leaving iſſue of her body *Edmund Pery*, her eldeſt ſon and heir at law,

another ſiſter, only a ſmall annuity. The *four ſiſters* and the *niece* take ſeveral eſtates for *life*, with *ſeveral remainders* to their ſons and daughters *reſpectively*: And there are no croſs remainders. The preſumption of law is in favour of raiſing croſs-remainders, between *two* only; and againſt raiſing croſs remainders between more than two But the preſumption in either caſe, may be *rebutted* by *manifeſt circumſtances of intention*, apparent on the face of the will.

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the other plaintiff in error. That on the death of *Mary Kerr*, who left no iſſue, the ſaid *Edmund Pery* and *Ann Manſell* entered upon her undivided fifth part, (the premiſes in queſtion,) and were ſeiſed thereof. That the ſaid *Jane Pery* and *Ann Manſell* are now the heirs at law of Sir *Chriſtopher*, and alſo of the ſaid Sir *Cecil Wray*.—Upon this ſpecial verdict, judgment was given in *Ireland* for *White*, the plaintiff in ejectment there, now the defendant in error. The queſtion was, "Whether, under the will of Sir *Chriſtopher Wray*, the plaintiffs in error were entitled to the inheritance of the whole of the eſtate, and of courſe, to the fifth part in diſpute? or, Whether it ſhould go to the defendant in error, claiming it under the will of Sir *Cecil Wray* the heir at law, and reverſioner in fee of Sir *Chriſtopher*?

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Serjeant *Hill*, for the plaintiffs in error, argued, that, in the event which had happened, they were entitled to the inheritance of the whole eſtate. 1. Upon the clear intention of the teſtator collected from the whole of the will taken together. 2. Suppoſing the intention of the teſtator to be doubtful, the legal operation of the words of the will were alone ſufficient to carry the whole eſtate to them.—Upon the *firſt* ground, he took notice of the circumſtances of the family at the time the will was made; that the objects of the teſtator's bounty, were his own brother in the firſt inſtance, and *his* family; in the next, four out of five of his ſiſters, and their families; for, *Mary Whitaker*, the *fifth* ſiſter, was to be *excluded*. That in the mode of entailing the eſtate, he had followed the common courſe of family ſettlements: In the firſt inſtance, giving the eſtate to his brother *for life*, remainder to truſtees, to preſerve contingent remainders, (which words he contended would go to all the other remainders, if it were neceſſary to argue it,) remainder to his firſt and other ſons *ſucceſſively in tail male*. Remainder to his daughters *in tail*, (omitting the words "ſucceſſively" and "*male*"), remainder to his ſiſters and niece *Mary Kerr* for their lives, ſhare and ſhare alike, as tenants in common, and not as joint-tenants. Remainder *to their ſons* ſucceſſively in tail, remainder to their daughters in tail; reverſion to his own right heirs. It was clear, therefore, from this diſpoſition, that he meant his family eſtate ſhould go *entire* to his family. If his brother had had only one daughter, ſhe would have taken the whole: So, if one of the ſiſters only had had a daughter, that daughter would have taken the whole. But if

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in the event which had happened, the ſhare of the deceaſed ſiſter were to go to the heir or heirs at law, the conſequence would be, that every one of the ſurviving ſiſters, of which there were four, would take a ſhare. So that their ſituation would be this; each would become tenant in *fee-ſimple* of a *twentieth part*, while ſhe continued tenant in *ſtrict ſettlement* only, of her own original *fifth* part. It was extremely clear therefore, from the words of the will, and ſtill more from the general deſign of it, (by which it was apparent that *Mary Whitaker* was to be excluded,) that the principal object of the teſtator was, to have his family eſtate go entire to the *deviſees*. But 2dly, He argued, that ſuppoſing this had not been a will, but a deed of conveyance to uſes, where the intent would be out of the queſtion, even in that caſe the words would ſupport the conſtruction he contended for; and by legal operation paſs the whole eſtate to the plaintiffs in error. For, by the terms of the deviſe, the daughters of the ſiſters take by way of deſcription, as purchaſers in their own right; it being an eſtabliſhed rule of law, that wherever there is a limitation, with a remainder to ſeveral perſons not *in eſſe*, the firſt perſon who comes *in eſſe* ſhall take the whole, ſubject to its being deveſted, in proportion to the ſhares of any other perſons who ſhall come *in eſſe*, before the determination of the particular eſtate. *Bac. Law Tracts*, 351. 1 Ld. *Raym.* 311. S. P. By the common law, independent of the ſtatute of uſes, where there was a conveyance to many, and only one *in eſſe* or capable, ſuch perſon took the whole. *Perkins*, *ſect.* 204. It may be objected, however, that this deviſe to the teſtator's ſiſters and niece for life, remainder, *&c.* ought to be conſtrued *reddendo ſingula ſingulis*; and that the daughter of each ſhould only take their mother's ſhare: But that would be an arbitrary inſertion of words, contrary to the plain intention of the teſtator. The word "daughters" is never a word of limitation, but a word of purchaſe; and therefore, if only one ſiſter had had a daughter, and the other three ſiſters had died without iſſue, the daughter of the ſurviving ſiſter would have taken the ſhare of the other three, in her mother's life-time. And he cited *Weld* verſus *Bradbury*, 2 *Vern.* 705. *Bateman* verſus *Roach*, 9 *Mod.* 104. *Brookes* verſus *Taylor*, 8 *Vin.* 313.

Mr. *Dunning*, *contra*, contended, that it was impoſſible, in the event which had happened, not to conſtrue the remainder to the daughters of the ſiſters, *reddendo ſingula ſingulis*. The deviſe to the

the parents, is to them as *tenants in common* for life, which is an *actual diviſion of a fifth to each*; the remainder to the ſons, follows immediately after, and is to them "*ſucceſſively*," which is as ſtrong as if it had been limited to them "reſpectively;" and then follows the deviſe to the daughters. So that the eſtates are as diſtinct as language can make them. Therefore, he prayed the judgment might be affirmed. 1778. PERY *et al.* *verſus* WHITE.

Lord MANSFIELD.—There have been many caſes upon croſs remainders by implication; and I take the rule ſettled by them to be this: That wherever croſs remainders are to be raiſed by implication between *two*, and no more, the *preſumption* is in *favour* of croſs remainders; where they are to be raiſed between *more* than *two*, there the preſumption is *againſt* croſs remainders: But that preſumption may be anſwered by circumſtances of plain and manifeſt intention either way. This is a qualification of the rule laid down in former caſes; for they ſeem to ſay, that there ſhall *not* be croſs remainders between more than two. Lord *Hardwicke*'s authority leant a good deal that way; and ſo do the caſes of *Comber* v. *Hill**, *Williams* verſus *Brown*†, and ſome others. But the true rule is, to take it with the qualification I have ſtated. Here, the preſumption is againſt croſs remainders. The queſtion therefore is, Whether there are circumſtances of intention ſufficient to deſtroy that preſumption. The circumſtances relied on, are *two*. 1. That one ſiſter, upon the death of her brother Sir *Cecil*, without iſſue, male or female, and who till then could take nothing at all, would be a co-heireſs with the reſt of her ſiſters; and, though not an object of the teſtator's bounty, would, upon the deceaſe of either of them, come in for a ſhare of her fifth part: and, therefore, the reverſion given by the teſtator to his right heirs, was not intended to take place till a failure of iſſue of all the other ſiſters. The other circumſtance is, that ſuppoſing croſs remainders are not implied, the other ſiſters would take the accruing ſhare as ſurvivors in *fee*, while they had their original ſhare only in tail; and that is contrary to the intention of the teſtator. This, I think, is the amount of all that the ingenuity of the counſel has been able to ſuggeſt. The anſwer to it is this: That the reverſion to the right heirs of the teſtator, is barely after all the other eſtates are diſpoſed of; and his heir at that time, was his brother. He might give him a general

* 2 *Str.* 969. † 2 *Str.* 996.

reverſion

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reverſion in fee after all theſe remainders. But the conſtruction that is contended for, ſuggeſts to me the ſtrongeſt argument upon the words of this will, to ſay, that the word "*reſpectively*" is ſupplied by ſynonimous expreſſions. For how is the eſtate given? It is given to the four ſiſters and the niece during their lives, ſhare and ſhare alike, as tenants in common, "and not as "joint-tenants." Why then, during their lives, there is a diviſion; each is to have a fifth for life, to enjoy in ſeverality. Then follows, "the remainder to their ſons ſucceſſively" in tail. What is the meaning of the expreſſion "their ſons?" It is impoſſible to conſtrue it otherwiſe than "*reſpectively*," that is, remainder of the ſhare of the ſiſter dying, to her ſons ſucceſſively, remainder to *her* daughters, as coparceners; and then the reverſion to the right heirs: that is, the reverſion of the ſhare of the ſeveral tenants for life and their iſſue reſpectively. It is abſurd to ſay, that the children of the other ſiſters ſhould take the ſhare of the deceaſed ſiſter, as purchaſers in the life-time of their mother. Therefore, I am of opinion the judgment ſhould be affirmed.

Mr. Juſtice *Buller* cited the caſe of *Miller* v. *Moore*, adjudged about the year 1740, which he ſaid was taken notice of by *Aſton* Juſtice, in the caſe of *Doe ex dim. Burden* v. *Burville* as a caſe that had ſettled the rule reſpecting croſs remainders by implication.

Per Cur. Judgment affirmed.

Same day.

M'LEISH *verſus* TATE.

THIS came before the court upon a caſe reſerved at the laſt *Lent* aſſiſes, at *Kingſton*, before Mr. Juſtice *Blackſtone*, ſtating in ſubſtance as follows:—"In replevin, the plaintiff "declared againſt the defendant, for taking ſeveral of his goods "and chattels, in certain places called the chalk-pit, *&c.*" The defendant avowed the taking, becauſe the plaintiff and *Samuel Meeke* (his partner) enjoyed the ſaid chalk-pit from *Midſummer* 1775, to *Michaelmas* 1775, at the rent of 15*l.* for that quarter, and the ſaid chalk-pit and other the premiſes, from *Michaelmas* 1775, to *Michaelmas* 1777, at the rent of 100*l.* *per annum*, and becauſe the ſaid rents were in arrear, *&c.* The plaintiff traverſed that he and the ſaid *Samuel Meeke* enjoyed the

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ſaid chalk-pit, and other premiſes under the demiſe in the avowry mentioned, and thereupon iſſue was joined. At the trial it appeared, that the plaintiff and the ſaid *Samuel Meeke*, at *Midſummer*, 1775, got poſſeſſion of the chalk-pit in queſtion, under an agreement with Mr. *Shrubb*, attorney or agent for the defendant, at the rate of 20 *l.* a-year: and at *Michaelmas*, 1775, by agreement with *William Horſenell*, tenant to the defendant, they alſo came into poſſeſſion of the other three fields, upon certain terms, both which agreements were ſubject to the approbation, or otherwiſe, of the defendant and his wife, who were then abroad. On their return to *England*, after many tranſactions, it was agreed on the 26th of *November* 1776, between the ſaid *Samuel Meeke* and *David James*, agent for the defendant, that a leaſe ſhould be drawn of the whole premiſes, for ten years from *Michaelmas* 1775, at 100 *l.* a-year rent, with the uſual covenants; and that the ſaid plaintiff and *Samuel Meeke* ſhould pay 15 *l.* for the chalk-pit, from *Midſummer* to *Michaelmas* 1775, and *Meeke* then paid 57 *l.* 10 *s.*: and a receipt or memorandum was given by the ſaid *David James*, and ſigned by him and the ſaid *Samuel Meeke*, in the words and figures following: "Received 26th *November* 1776, of *Samuel Meeke*, Eſq; the "ſum of 57 *l.* 10 *s.* in part and on account of 115 *l.* for ſo much "rent agreed to be due from him and Mr. *M'Leiſh*, at *Michaelmas* "laſt, for a chalk-pit and lands ſituate, *&c.*"—*No leaſe* was ever *executed*, although a draught of the leaſe for nine years from *Michaelmas*, 1776, was made, and left with the ſaid *Samuel Meeke*, by the defendant's agent.—A verdict was found for the plaintiff, with 1 *s.* damages, and 40 *s.* coſts, ſubject to the opinion of the court upon the following queſtions:—Firſt, Whether the ſum of 15 *l.* for the quarter ending at *Michaelmas*, 1775, is to be conſidered as a rent under the demiſe mentioned in the avowry? Secondly, Whether the agreement for the ten years' leaſe, under the circumſtances aforeſaid, was good under the ſtatute of frauds?

Mr. *Peckham* for the defendant argued, that the proceedings in avowry are favoured by law; and the ſame ſtrictneſs not neceſſary as in a declaration. To this purpoſe he cited *Macdonnel* v. *Weldon*, *Trin.* 8 *Geo.* 1. *B. R.* 1722, and *Richards* v. *Cornforth*, 2 *Salk.* 580. in which latter caſe it was held, "that "upon an avowry for *more rent* than was *due*, if the avowant had "abated the ſurplus before judgment, it would have been good "*pro tanto*." The ſtat. 11 *Geo.* 2. *c.* 19. has alſo, in aid of avowants,

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avowants, chalked out the line they are to purſue, and the defendant has here followed it. The firſt queſtion is, Whether the 15*l.* rent due at *Michaelmas*, is to be conſidered as a rent under the demiſe? As to that, though the rent reſerved under the firſt agreement for the chalk-pit, was only 20*l. per ann.* yet both were ſubject to the approbation of the defendant; and the part payment of the rent was under the *ſecond*, which the defendant had approved of. The 2d queſtion is, Whether the agreement for a ten years' leaſe, is good under the ſtatute of frauds, not being reduced into writing? As to that, it has been frequently decided, that where the agreement is confeſſed, or part executed, it is good, though not reduced into writing. *Croyſton* verſus *Banes*, *Prec.* in *Canc.* 208. *Moore* v. *Hart*, 1 *Vern.* 110. *Butcher* verſus *Stapely*, *et al. Ibid.* 363. *Lacon* v. *Martyns*, 3 *Atk.* 1. Here the agreement is both confeſſed, and in part executed by each, by the payment and acceptance of rent in part. Therefore, he prayed judgment for the defendant.

Mr. *Rous*, *contra*, for the plaintiff contended, that notwithſtanding the ſtat. 11 *Geo.* 2. it is *c.* 19. ſtill neceſſary for the avowant, to ſpecify the particular demiſe under which he claims, and the rent reſerved. But moſt clearly, the eſſential requiſite to entitle him to recover, namely, that the rent diſtrained for ſhould exiſt at the time of the demiſe, continues the ſame as before the ſtatute. It muſt *grow out of the contract*. But here, the caſe ſtates, that the plaintiff came into poſſeſſion of the chalk-pit under a rent of 20*l. per ann.*: whereas, the demiſe ſtated in the avowry, is at the rate of 15*l.* for one quarter; which is a totally different contract. But ſuppoſing the plaintiff did agree to the rent reſerved in the ſecond agreement, it was upon condition of a ten years' leaſe, which is not executed; therefore, the conſideration fails. 2. There has been no part execution of the agreement for a leaſe, as contended on the other ſide; for the receipt given by *James*, does not ſpeak of the rent paid, as rent reſerved under the intended demiſe. Nor could there poſſibly be a part execution in any ſenſe of the phraſe; becauſe the poſſeſſion was under a different agreement. Therefore he prayed judgment for the plaintiff.

Lord MANSFIELD.—It is very plain what the juſtice of the caſe is: It is that the leaſe ſhould be executed. The only material fact is, Whether the defendant is ready to execute it, and the plaintiff diſſents. It is clear the plaintiff has held at a rent: It is as clear that he has agreed to let that rent be 15*l.* from *Mid-*

ſummer

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ſummer to *Michaelmas*. At the ſame time, there were other ſtipulations to be performed on the part of the defendant, and therefore he ſays, he ought not to be bound by what he has agreed to, unleſs the defendant will perform his part. But the anſwer given to that is, that the defendant is ready to perform the whole of it. The firſt agreement is out of the queſtion. The real juſtice of the caſe is, that the leaſe ſhould be executed. Therefore let it be added to the caſe, which party is backward to execute it.

Adjornatur.

An affidavit was accordingly made, ſtating that the defendant was, and is ready to execute the leaſe in queſtion, a draught of which was in the plaintiff's poſſeſſion; but that the plaintiff, without objecting to the terms of it, refuſed, and ſtill refuſes, to accept it.

The court upon the 1ſt point, held this a demiſe at a rent certain, for that the ſubſequent agreement ſhould by relation operate to make it a reſervation of the rent from the beginning

Judgment for the defendant

HORE *verſus* WHITMORE.

Saturday, May 16th.

If a ſhip *warranted* to ſail on or before a particular day, be prevented from ſailing on the day by an embargo, the warranty is not complied with.

THIS came before the court upon a rule to ſhew cauſe, why the verdict given for the plaintiff in this caſe ſhould not be vacated, and judgment entered for the defendant, as in caſe of a nonſuit. The declaration ſtated, that upon a policy of inſurance on the ſhip *New Weſtmoreland*, at and from *Jamaica* to *London*, *warranted* to ſail *on* or before *the* 26*th* of *July* 1776, free from capture, and from all *reſtraints and detainments of kings*, *princes*, and people of what nation, condition, or quality ſoever, the ſaid ſhip was preparing and ready to ſail, and would have ſailed on the 25th of *July*, on her intended voyage, if ſhe had not been reſtrained by the order and command of Sir *Baſil Keith*, the then governor of *Jamaica*, and detained beyond the day. That ſhe afterwards ſailed, and was captured, *&c.*

Mr. *Wallace*, who ſhewed cauſe, objected, that the uſual clauſe againſt the detention of rulers and princes being inſerted in this policy, the embargo by which the ſhip was prevented from ſailing on the day mentioned in the warranty, came expreſsly within the meaning of it; and therefore excuſed the delay.

Mr.

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Mr. *Dunning*, *contra*, contended that the loſs of the ſhip could in no poſſible reſpect be connected with the embargo. That the warranty was poſitive and expreſs, that the ſhip ſhould depart on or before the day appointed, and therefore muſt be complied with. And of this opinion was the court. Accordingly, the rule for the nonſuit was made abſolute.

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PAWSON *verſus* WATSON.

A *warranty* inſerted in a policy of inſurance, muſt be *literally* and *ſtrictly* complied with.—A *repreſentation* to the underwriter, need only be *ſubſtantially performed*. But if *falſe* in a *material* point, it will avoid the policy.

UPON a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* reported as follows: This was an action upon a policy of inſurance. At the trial it appeared in evidence, that the *firſt* underwriter had the following *inſtructions* ſhewn him: "Three thouſand five "hundred pounds upon the ſhip *Julius Cæſar*, for *Halifax*, to "touch at *Plymouth*, and any port in *America*: She mounts "12 guns and 20 men." Theſe inſtructions were not aſked for or communicated to the defendant; but the ſhip was only repreſented *generally* to *him*, as a *ſhip of force*: And a *thouſand pounds* had been done, before the defendant did any thing upon her. The inſtructions were dated the 28th *June* 1776, and the ſhip ſailed on the 23d *July* 1776; and was taken by an *American* privateer. That at the time of her being taken, ſhe had on board 6 *four pounders*, 4 *three* pounders, 3 *one* pounders, 6 *half* pounders, which are called *ſwivels*, and 27 men and boys in all, for her crew; but of *them*, 16 only were *men*, (not 20, as the inſtructions mentioned,) and the reſt, boys. But the witneſs ſaid, he conſidered her as being ſtronger with this force, than if ſhe had 12 carriage guns and 20 men: He alſo ſaid, (which is a *material* circumſtance,) that *there were neither men nor guns on board, at the time of inſurance*. That he himſelf inſured at the ſame premium, without regard or enquiry into the force of the ſhip. Other underwriters alſo inſured at the ſame premium, without any other repreſentation than that ſhe was a *ſhip of force*. That to every *four* pounder there ſhould be *five* men and a boy. That in merchant ſhips, boys always go under the denomination of men.—This was met by evidence on the part of the *defendant*, ſaying, that guns mean *carriage* guns, not *ſwivels*, and men mean *able men* excluſive of boys. There were three cauſes of the ſame nature*, depending upon the ſame

* The names of the other two cauſes were *Pawſon* v. *Snell*, and *Pawſon* v. *Ewer*.

evidence;

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evidence: The defence in each was, that these instructions were to be considered as a *warranty*, the same as if they had been *inserted in the policy*; though they were not proved to have been shewn to any but the first underwriter. In all the three cases, the question reserved for the opinion of the court is, "Whether "the written instructions which were shewn to the first under-"writer, are to be considered as a warranty inserted in the policy, "or as a *representation*, which would only avoid the policy, if "fraudulent?" If the court should be of opinion, that the instructions amounted to a warranty, then a new trial is to be granted in each, without costs; otherwise, the verdicts are to stand.

At the trial I was of opinion, that it would be of very dangerous consequence to add a conversation that passed at the time, as part of the written agreement. It is a collateral representation: And if the parties had considered it as a warranty, they would have had it inserted in the policy. But secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both *material* and *fraudulent*: And in that light, I held, that a misrepresentation made to the first underwriter, ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise, it would be a contrivance to deceive many: For where a good man stands first, the rest underwrite without asking a question; and if he is imposed upon, the rest of the underwriters are taken in by the same fraud. The case was left to the jury under that direction.

Mr. *Wallace*, who shewed cause, insisted that the instructions in question were no warranty, but a *representation*. That the policy is the formal instrument containing the final agreement of the parties; and therefore no instructions, parol or *written*, can be admitted to contradict it. 2. With respect to its being a *fraudulent* misrepresentation, the evidence proved, and the jury by their verdict found there was no fraud. On the contrary, the terms of the representation were more than complied with: For by the evidence it clearly appears, that the force actually on board, exceeded the force specified in the instructions. Therefore, he prayed the rule might be discharged.

Mr. *Mansfield*, Mr. *Macdonald*, and Mr. *Davenport*, *contra*, in support of the rule, contended, that the instructions in question, being contained in the same paper as that which named the ship and captain, were the *basis* of the agreement between the

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the parties; therefore, moſt clearly to be conſidered as a warranty: Without it, there was no agreement at all. There was no ſhip, no ſubject upon which the policy could attach. If not intended as the foundation and ground of the inſurance, why write down a ſpecific force? Why not ſtate only, that ſhe was a ſhip of force *generally*, unleſs that the real force ſhe was to carry might be correctly underſtood? If there is a writing, whether inſerted in the inſtrument or in any collateral paper, or whether a warranty technically ſo called or not, makes no difference. It is equally the baſis of agreement between the parties; therefore in ſtrictneſs, it ought to be complied with. Suppoſe there had been *no* guns at all, could the plaintiff have recovered in that caſe? Yet evidence of that, would have been as much a contradiction to the policy, as this, for no mention is made of guns in the policy. Or, ſuppoſe it had been written in the margin of the policy, could the policy have ſtood? Clearly it could not.—With reſpect to the neceſſity of the repreſentation being *material*, as well as fraudulent, whether material or not does not depend upon the opinions of particular perſons upon the particular caſe in queſtion; but whether the *ſubject* itſelf is, in its *nature* material. If the ſhip had been deſcribed to be of a particular colour, clearly that would have been no engagement, becauſe in its nature immaterial. But *guns* in time of war are in their own nature material; and indeed of the very eſſence of a policy: For the premium is regulated accordingly. It is not enough to ſay, that in the opinion of two or three perſons, the force actually on board was *equal*. The inſurer alone is to be the judge of that. But that is not the point. Whether ſhe was in a better or worſe ſtate, the underwriter has a right to ſay, the truth of the caſe is not according to what I bargained for, and therefore there is no contract between us. Upon theſe grounds they prayed the rule might be made abſolute.

Lord MANSFIELD aſked, Whether there was any caſe that made a difference between a written and a parol repreſentation? Upon receiving no anſwer, his Lordſhip proceeded to give his opinion as follows:——There is no diſtinction better known to thoſe who are at all converſant in the law of inſurance, than that which exiſts, between a *warranty* or condition which makes part of a written policy, and a *repreſentation* of the ſtate of the caſe. Where it is a part of the written policy, it muſt be performed: As if there be a warranty of convoy, there it muſt be a convoy: Nothing tantamount will do; or anſwer the purpoſe: It muſt

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be ſtrictly performed, as being part of the agreement; for there it might be ſaid, the party would not have inſured without convoy. But as, by the law of merchants, all dealings muſt be fair and honeſt, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a repreſentation, it will avoid the policy, as a fraud, but not as a part of the agreement. If, in a life policy, a man warrants another to be in good health, when he knows at the ſame time he is ill of a fever, that will not avoid the policy; becauſe by the warranty he takes the riſk upon himſelf. But if there is no warranty, and he ſays, "the "man is in good health," when in fact he knows him to be ill, it is *falſe*. So it is, if he does not know whether he is well or ill; for it is equally falſe to undertake to ſay that which he knows nothing at all of; as to ſay *that* is true, which he knows is not true. But if he only ſays, "he believes the man to be "in good health," knowing nothing about it, nor having any reaſon to believe the contrary; there, though the perſon is not in good health, it will not avoid the policy, becauſe the underwriter *then* takes the riſk upon himſelf. So that there cannot be a clearer diſtinction, than that which exiſts between a warranty which makes part of the written policy, and a collateral repreſentation, which, if falſe in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the uſage being to conſider inſtructions as a part of the policy, parol inſtructions were never entered in a book, nor written inſtructions kept, till many years ago, upon the occaſion of ſeveral actions brought by the inſured upon policies, where the brokers had repreſented many things they ought not to have repreſented, in conſequence of which the plaintiffs were caſt; I adviſed the inſured to bring an action againſt the brokers, which they did, and recovered in ſeveral inſtances: and I have repeatedly, at *Guild-hall*, cautioned and recommended it to the brokers, to enter all repreſentations made by them in a book. That advice has been followed in *London*: But it appeared lately, at the trial of a cauſe, that, at *Briſtol*, to this hour, they make no entry in their books, nor keep any inſtructions.

The queſtion then is, "Whether in this policy, the party "inſuring has *warranted* that the ſhip ſhould *poſitively* and *literally* "have *twelve carriage guns* and *twenty men?*" That is "Whether "the inſtructions given in evidence are a part of the policy?" Now, I will take it by degrees. The two firſt underwriters before the court, are *Watſon* and *Snell*. Says *Watſon*, "it is part of my

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" agreement, that the ſhip ſhall ſail with twelve guns and twenty " men; and it is ſo ſtipulated, that nothing under that number " will do. Ten guns with ſwivels will not do." The *anſwer* to this is, " read your agreement; read your policy." There is no ſuch thing to be found there. It is replied, yes, but in fact there is, for the inſtructions upon which the policy was made, contain that expreſs ſtipulation. The anſwer to that is, there never were any inſtructions ſhewn to *Watſon*, nor were any aſked for by him. What colour then has *he* to ſay, that thoſe inſtructions are any part of his agreement. It is ſaid, he inſured upon the credit of the firſt underwriter. A *repreſentation* to the firſt underwriter, has nothing to do with that which is the agreement, or the terms of the policy. No man who underwrites a policy, ſubſcribes, by the act of underwriting, to terms which he knows nothing of. But he reads the agreement, and is governed by that. Matters of intelligence, ſuch as that a ſhip is or is not miſſing, are things in which a man is guided by the name of a firſt underwriter, who is a good man, and which another will therefore give faith and credit to; but not to a collateral agreement, which he can know nothing of. The abſurdity is too glaring, it cannot be. By extenſion of an equitable relief in caſes of fraud, if a man is a knave with reſpect to the firſt underwriter, and makes a *falſe repreſentation* to him in a point that is *material*; as where having notice of a ſhip being loſt, he ſays ſhe was ſafe; that ſhall affect the policy with regard to all the ſubſequent underwriters, who are preſumed to follow the firſt. How then do *Watſon* and *Snell* underwrite the ſhip in queſtion? Without knowing whether ſhe had any force at all. *That* proves the riſk was equal to a ſhip of no force at all; and the premium was a vaſt one—eight guineas.—So much therefore for thoſe two caſes. The third caſe is that of *Ewer*, who ſaw the inſtructions, with the repreſentation which they contained. Did the number of guns induce him to underwrite the policy? If it did, he would have ſaid " put " them into the policy; warrant that the ſhip ſhall depart with " twelve guns and twenty men." Whereas, he does no ſuch thing, but takes the *ſame premium* which *Watſon* and *Snell* did, who had *no* notice of her having any force. What does that prove? That he is paid and receives a premium, as if it were a ſhip of no force at all.—The repreſentation amounts to no more than this, " I tell you what the force will be, becauſe it is ſo " much the better for you." There is no fraud in it, becauſe it is a repreſentation only of what, in the then ſtate of the ſhip, they thought would be the truth. And in real truth, the ſhip ſailed

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with a *larger* force: For ſhe had *nine* carriage guns, beſides ſix ſwivels. The underwriters, therefore, had the advantage by the difference. There was no ſtipulation about what the weight of metal ſhould be. All the witneſſes ſay, "ſhe had more force "than if ſhe had had twelve carriage guns, both in point of "ſtrength, of convenience, and for the purpoſe of reſiſtance." The ſupercargo in particular ſays, "he inſured the *ſame ſhip* and "the *ſame voyage*, for the *ſame premium*, without ſaying a ſyllable "about the force." Why then it was a matter proper for the jury to ſay, Whether the repreſentation was falſe? or Whether it was in a fact an inſurance, as of a ſhip without force? They have determined, and I think very rightly, that it was an inſurance without force.—*Ewer* makes an objection that the repreſentation ought to be conſidered as inſerted in the policy; but the anſwer to that is, he has determined whether it ſhould be inſerted in the policy or not, by not inſerting it himſelf. There is a great difference, whether it ſhall be conſidered as a fraud. But it would be very dangerous to permit all collateral repreſentations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. *Thornton* has paid, who was the firſt perſon that ſaw the inſtructions. Shall the reſt refuſe then? As to *Watſon* and *Snell*, they have no pretence to refuſe, for there is not a colour for the objection made by them. As to *Ewer*, we are all ſatisfied with the determination of the jury againſt him. Therefore, the rule for a new trial muſt be diſcharged.——*N. B.* On the *Monday* following, Mr. *Davenport* ſaid, he was deſired by the underwriters to aſk, Whether it was the opinion of the court, that to make written inſtructions valid and binding as a warranty, they muſt be inſerted in the policy? Lord *Mansfield* anſwered, that moſt undoubtedly that was the opinion of the court.—If a man warrants that a ſhip ſhall depart with twelve guns, and it departs with ten only, it is contrary to the condition of the policy.

BROWNING *verſus* MORRIS.

Monday, May 18th.

Money paid by the *inſurer* or *lottery-office-keeper*, in conſequence of having inſured the defendant's tickets, cannot be recovered back. But the premiums of inſurance, paid by the *inſured*, to the lottery-office-keeper, may.

UPON ſhewing cauſe why the verdict found in this caſe, for the plaintiff, ſhould not be vacated, and a nonſuit entered in its ſtead; Lord *Mansfield* reported in ſubſtance as follows: This was an action for *money had and received*. The plaintiff

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and defendant were both lottery-office-keepers; and during the drawing of the lottery, entered into an agreement mutually to inſure the number of a ticket with each other, upon condition, that he whoſe number ſhould be drawn on the day next following the agreement, ſhould receive from the other an undrawn ticket, or the value of it at the market price. The defendant's number being drawn, he choſe the price of an undrawn ticket, which came to 14 *l.* 3 *s.* and received that ſum from the plaintiff. The next day, each inſured another number upon the ſame terms. And ſo the contract was continued from day to day. It afterwards happened, that the plaintiff's number was drawn; when the defendant, inſtead of complying with the terms of the agreement as the plaintiff had done, refuſed to give the plaintiff either an undrawn ticket or the value of it. Neither of them had any tickets in their poſſeſſion, the conſequence of which is, that the contract was illegal, and againſt the ſtatute. The queſtion is, Whether the plaintiff is entitled, in diſaffirmance of the contract, to recover back the ſum which he has paid upon this illegal tranſaction?

This caſe was argued on *Saturday*, *May* 18th, in this term.—Mr. *Wallace*, who ſhewed cauſe, argued, that the plaintiff in this caſe, was in the ſame ſituation as a perſon who has paid uſurious intereſt upon a corrupt and illegal contract, for which an action for money had and received will clearly lie. That the ſtat. 17 *Geo.* 3. *c.* 46. by which this ſpecies of contract is prohibited, impoſes the penalty only on the *inſurer*, which the defendant was in this caſe, and *not* on the *inſured*; and cited the caſe of *Jaques* verſus *Golightly*, *Paſch.* 16 *Geo.* 3. *C. B.* where, it was adjudged, that a perſon who had paid a lottery-office-keeper ſeveral ſums of money, as the premium for inſuring a number of tickets, was entitled to recover them back*.

Mr. *Dunning*, *contra*, for the defendant, contended, that, though the plaintiff could not have been compelled to pay the defendant the money in queſtion, the contract being declared void by the ſtatute, yet having once paid it, where in juſtice and good faith it was due, he could never have the aſſiſtance of an action for money had and received, which is an equitable action founded in conſcience, to recover it back. This point did not occur in *Jaques* v. *Golightly*, in the *Common Pleas*. The ſole ground of determination in that caſe was, that the plaintiff was not *particeps criminis*. But my objection is, that the money being

* *Vide* this caſe ſince reported, in 2 *Blackſt.* 1,073.

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conſcientiouſly due in *honour* and *honeſty*, and *paid* to the defendant, cannot be recovered back; and ſo it is expreſsly laid down in *Moſes* verſus *Macfarlane*, 2 *Bur.* 1,012. So, money fairly loſt at play, money paid for the price of ſmuggled goods, are not recoverable in an action for money had and received. The contract is *executed*; and *potior eſt conditio defendentis.*

Cur. adviſare vult.

Lord *Mansfield*, on this day, delivered his opinion as follows: The rule is, *in pari delicto, potior eſt conditio defendentis:* And there are ſeveral other maxims of the ſame kind. Where the contract is executed, and the money paid in *pari delicto*, this rule, as Mr. *Dunning* contended, certainly holds: And the party who has paid it, cannot recover it back. For inſtance, in *bribery*, if a man pays a ſum of money by way of a bribe, he can never recover it in an action; becauſe both plaintiff and defendant are *equally criminal.* But, where contracts or tranſactions are prohibited by poſitive ſtatutes, for the ſake of protecting one ſet of men from another ſet of men; the one, from their ſituation and condition, being liable to be oppreſſed or impoſed upon by the other; *there*, the parties are *not in pari delicto*; and in furtherance of theſe ſtatutes, the perſon injured, after the tranſaction is finiſhed and completed, may bring his action and defeat the contract. For inſtance, by the ſtatute of uſury, taking more than 5 *per cent.* is declared illegal, and the contract void; but theſe ſtatutes were made, to protect needy and neceſſitous perſons from the oppreſſion of *uſurers* and monied men, who are eager to take advantage of the diſtreſs of others; whilſt they, on the other hand, from the preſſure of their diſtreſs, are ready to come into any terms, and, with their eyes open, not only break the law, but complete their ruin. Therefore, the party injured may bring an action for the exceſs of intereſt. Another inſtance that occurs to me is, the clauſe in the ſtat. 5 *Geo.* 2. *c.* 24. *ſect.* 17. to prevent bad practices upon bankrupts, who have not obtained their certificate; and who, for the ſake of obtaining it, will come into any terms, and cauſe their friends to come into any terms, which a hard creditor may chuſe to impoſe. The ſtatute prohibits "taking any money or ſecurity "from the bankrupt himſelf, or any perſon on his behalf, "as the *conſideration* for *ſigning his certificate.*" Suppoſe a creditor refuſes, unleſs the bankrupt conſents to give him a ſum of money. The bankrupt gets the money from a friend or relation, and the creditor, in conſequence, ſigns the cer-

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tificate. The bankrupt renews his trade, and receives every advantage he can derive from having obtained his certificate. He may notwithſtanding bring his action and recover the money back. And this, though he has acted contrary to a law made for his own benefit*. This brings the preſent caſe within the determination of *Jaques* v. *Golightly*, in *C. B.* For in that caſe the Chief Juſtice ſaid, "the ſtatute is made to protect the ignorant and deluded multitude, who in hopes of gain and prizes, and not converſant in calculations, are drawn in by the office-keepers." And it is very material, that the ſtatute itſelf, by the diſtinction it makes, has *marked* the *criminal*: For the penalties are all on *one* ſide; upon the *office-keeper*. The man who makes the contract is liable to no penalty. So in uſury, there is no penalty upon the party who is impoſed upon. It is true, that in theſe caſes, the court will not aſſiſt the party who makes the illegal contract to recover any money he may win of the office-keeper; but he ſhall have his action for all the money which the office-keeper has got from him.

After Lord *Mansfield* had proceeded thus far, it occurred that the plaintiff was himſelf a lottery-office-keeper, and brought his action, not for money paid by him to the defendant for inſuring; but for money paid by him to the defendant in conſequence of his having inſured the defendant's tickets. So that the plaintiff was not only *in pari delicto*, but alſo ſtood in the light and under the deſcription of that ſpecies of inſurer, from whom the ſtatute meant to protect the unwary.

And the court were finally of this opinion (allowing the determination of the *Common Pleas* to be right) and accordingly

A nonſuit was entered.

* *Vide* Smith v. Bromley, *Dougl. Rep.* 670. *n.*

Same day.

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A. in conſideration of advancing 45*l.* for which he takes the borrower's note of hand, *payable on demand*, ſtipulates to have *half of the profits* upon a *re-ſale* of certain goods intended to be purchaſed by the borrower with the money; *two hours* after the purchaſe, *A.* demands payment of the note; and the ſame night puts a perſon into poſſeſſion jointly for himſelf and the borrower. —The neat profits upon a re-ſale were 5*l.*——The bargain is *unconſcionable*; and therefore, *A.* ſhall not recover his ſhare of the profits in an *action for money had and received.*

THIS was an action for "*money had and received*:" And, upon a rule to ſhew cauſe why the verdict obtained for the plaintiff ſhould not be ſet aſide and a nonſuit entered in its ſtead, Lord *Mansfield* reported as follows:—The plaintiff and defendant were both *brokers*: The defendant wanted to purchaſe

a parcel

a parcel of goods, which had been diſtrained for rent: but had no money. He applied therefore to the plaintiff; who, on the 12th of *November* 1777, lent him 45*l.* upon his note of hand, *payable on demand*. At the *ſame time* it was agreed, that the plaintiff ſhould have *half of the neat profits*, which ſhould be made of the goods upon the re-ſale of them, *over and above the note of hand*. *Two hours* after the ſale, *payment* of the note of hand was *demanded* by the plaintiff, in order to force the defendant to ſell the whole of the goods to him; and, as an inducement, the plaintiff offered him 3*l.* profit, which the defendant refuſed; and ſold the goods afterwards for 5*l.* profit. The plaintiff paid the 45*l.* to the landlord by the direction of the defendant, and put a man into poſſeſſion on the night of the ſale. The note was repaid on the 21ſt of the ſame month. This action was brought for 2*l.* 10*s.* the half of the neat profits for which the goods were re-ſold.—Towards the end of the cauſe, it ſtruck me, that this contract was uſurious on the part of the plaintiff; becauſe he was to have *half of the profits*, and was to *run no riſk*. The jury found a verdict for the plaintiff, ſubject to the opinion of the court, upon the queſtion, Whether this contract was uſurious, or not? If the court ſhould be of opinion, that it *was*, then the verdict was to be ſet aſide, and a nonſuit entered in its ſtead.

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Mr. *Wallace*, in ſupport of the verdict, argued, that this was not an uſurious contract. 1. Becauſe there was no *certainty* upon the original agreement of *any intereſt* beyond 5 *per cent.*; but the whole reſted in contingency, upon what would be the neat profits ariſing from the *re-ſale of the goods*; and if there had been *no profit at all*, the plaintiff would have had *no intereſt whatever*. It is true a *mere colourable contingency* will not aid a contract, where by the very terms of the agreement uſurious intereſt is reſerved; but in the preſent caſe, it could not be known what the profits of the ſale would be; it depended upon the defendant's meeting with a good purchaſor; and upon the money being collected in. It might happen, that the goods ſhould ſell at a loſs. The contingency therefore was *real*, *not colourable* only: Conſequently, not within the ſtatute. 2. To make a contract uſurious, illegal intereſt muſt be reſerved by the very terms of the contract: Whereas in this caſe the note of hand given by the defendant bore no intereſt at all. Therefore he prayed the rule might be diſcharged.

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Mr. *Howorth*, *contra*, in ſupport of the rule, inſiſted, that the tranſaction was clearly uſurious. All that is eſſential to make a contract uſurious is, that it ſhould be for a *loan*, with a *reſervation* of *more* than 5 *per cent.* intereſt, for *forbearance* of the *principal*. Here the principal was ſecured by a note of hand, *payable on demand*: Conſequently, the plaintiff run no riſk. In addition to this the plaintiff at the ſame time ſtipulates for *half of the neat profits* upon a re-ſale of the goods; which, it appears, far exceeded the rate of legal intereſt. It is material too in this caſe, that the plaintiff who had viewed the goods muſt, from his occupation, neceſſarily have known what they were fairly worth. If the contract is a loan, and the intention is to get more than legal intereſt, no ſhift or contrivance can take it out of the ſtatute. A contract is not leſs uſurious, becauſe no intereſt is reſerved upon the ſum advanced; if ſomething alſo, as a *horſe*, &c. the value of which exceeds the legal rate of intereſt, is ſubſtituted in its ſtead. Therefore he prayed a nonſuit might be entered.

Lord MANSFIELD.—This is an action for *money had and received*; and therefore it is analogous to a bill in equity. The ground of the action is, to recover half of the neat profits ariſing by the re-ſale of certain goods purchaſed by the defendant as ſtated in the report. The general queſtion is, "Whether the plaintiff "ought to recover in an action for *money had and received?*" That is, "Whether it is *againſt conſcience* that the defendant ſhould "retain the *whole* profits of the goods in queſtion to himſelf?" There are two grounds, either of which is an anſwer to the action. 1. If the contract be uſurious within the ſtatute; Or, 2. though not uſury within the ſtatute, if it be an unconſcionable bargain. You all remember where the court held a caſe not within the ſtatute of uſury. I mean the caſe of the wire-drawers*. The ground of the action there was, that the plaintiffs, who were gold refiners, had advanced gold wire to others in the ſame trade, upon the terms of paying ſuch a price, if the money was paid *within three months*; and if *not*, *then* to pay at the rate of *an halfpenny an ounce per month*, *over and above* the price agreed for; which in fact, upon calculation, amounted to above 5 *per cent.* This, at the trial, was proved to be the *conſtant uſage of the trade*. An objection was made on the part of the defendant that it was uſurious. A verdict was found for the plaintiff, and a queſtion reſerved for the opinion of the

* Floyer *v.* Edwards, *ſupra*, 112.

court,

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court, Whether this contract was uſury? And under all the circumſtances, eſpecially the conſtant uſage, the court were of opinion it did not amount to uſury within the ſtatute. Some time after, an action was brought for *money had and received*, upon a ſimilar contract, "to recover the *ſurplus* of the half-penny an ounce*." The defendant paid into court the principal and intereſt at 5 *per cent.* from the time of the bargain, and offered to pay coſts down to the action brought: And the ſingle queſtion was, "Whether the *exceſs* of intereſt ſhould be paid?" It appeared manifeſtly at the trial, that this exceſs was only to be taken in caſe of delay of payment at the end of three months, and for no other reaſon whatſoever; and the vendee was at liberty to have paid the principal at the expiration of that time. I ruled at *Guildhall* that the tranſaction ought to be conſidered as not uſury within the ſtatute. But the law of the land having declared that 5 *per cent.* was ſufficient for delay of payment, I was of opinion that the demand of the ſurplus was an *exorbitant demand*, and therefore ought not to be recovered in an *action for money had and received.* The jury accordingly found a verdict for the defendant, and that opinion was acquieſced in without any new trial being moved for.—But to conſider this caſe firſt in the light of an uſurious contract. There is no contrivance whatever by which a man can cover uſury. Here are two brokers. One, who is the defendant, wants to buy goods that were upon ſale; and the other agrees to lend him money for that purpoſe; but he is to lend it upon the terms of being paid both principal and intereſt from the time the loan commenced. It is true no rate of intereſt is reſerved in the note: But it is made *payable on demand:* From the moment of demand therefore, it would carry intereſt; and the plaintiff had it in his power to make demand, the very inſtant the bill was delivered. Beſides this, he does not even truſt the defendant with the poſſeſſion of the money in his own hands. But when the goods are bought, and not *before*, he pays the money to the landlord for the defendant. Within two hours after he demands the money, and then the note begins to carry intereſt. He was not bound by the agreement to give credit for a moment. So that there was no ſort of riſk whatſoever; and in fact, as ſoon as the money was paid, a man was put into poſſeſſion for himſelf, as well as for the defendant. The note therefore, was payable with intereſt from the time of demanding payment, and he has poſſeſſion of the goods:

* The name of it was *Plumb* v. *Carter.* See a ſhort note of it *ſupra*, 116.

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That was manifeſtly with a view to ſecure to himſelf the ſurplus advantage which he had ſtipulated for, upon a re-ſale. Both parties from their ſituation knew there would neceſſarily be a profit. It ſeems to me therefore, that the intention of the contract was to get more than principal and legal intereſt upon the note, which is uſury within the meaning of the ſtatute. But ſuppoſe it were not ſtrictly uſurious, ſhall a man in an action for *money had and received*, which is an equitable action, and founded in conſcience, recover ſuch an unmeaſurable and exorbitant demand as this is? Moſt clearly he ſhall not. Therefore, upon either ground, the verdict muſt be ſet aſide, and the nonſuit entered.[1]

WILLES, Juſtice.—I am of the ſame opinion.

ASHHURST, Juſtice.—I think that upon the original contract, it muſt be underſtood the plaintiff was to have no intereſt, and therefore the contract itſelf was not uſurious. But having broken the faith of that agreement, by making an immediate demand of payment, and thereby entitling himſelf to intereſt, I am of opinion he has precluded himſelf from demanding a ſhare of the profits of the ſale likewiſe; for it is againſt conſcience that he ſhould have both.

BULLER, Juſtice—Whether this be uſurious or not, it is clearly great oppreſſion. Lending money is giving credit. And here the conſideration was, that the plaintiff ſhould have half the profits of the ſale. But inſtead of giving credit, he demands the money immediately. The conſideration therefore is at an end,

Per Cur. Let a nonſuit be entered.

Tueſday, May 19th.

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THIS was a caſe out of *Chancery*, for the opinion of this court, ſtating in ſubſtance as follows; "That *George Phipard* being ſeiſed in fee of a fourth part of an eſtate in *Surrey*, made his will bearing date the 5th of *June*, 1738; and thereby diſpoſed of the ſame as follows: "As for and touching the diſ- "poſition of *all ſuch temporal eſtates* as it has pleaſed GOD to "beſtow upon me, I give and diſpoſe thereof as followeth. "Firſt, I give, deviſe, and bequeath *all* thoſe my lands, tene- "ments and hereditaments, ſituate and being at *Merton Abbey*

One by will deviſes all his lands to his *two* brothers *W. P.* and *J. P.* and his *ſiſter E. C.* and the *heirs of their bodies*, as *tenants in common*, and for *want of ſuch iſſue*, to his own *right heirs*.—And then gives all the reſt and reſidue of his goods and chattels, as well *real* as *perſonal*, equally between his ſaid brothers and ſiſter, ſhare and ſhare alike. The deviſees take *croſs-remainders*.

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" in the county of *Surrey*, unto my loving brothers, *William* " *Phipard* and *John Phipard*, and ſiſter *Elizabeth Cleaves*, and " the *heirs of their bodies lawfully begotten* and to be begotten, " as tenants in common, and not as joint tenants; and *for* " *want of ſuch iſſue*, to my own right heirs for ever. All " the reſt and reſidue of my goods and chattels whatever, as well " *real* as *perſonal*, I give and bequeath unto my ſaid brothers and " ſiſter, *equally to be divided* between them, ſhare and ſhare alike." *George Phipard* died ſoon after making his will, leaving his brothers and ſiſter ſurviving, of whom *William* was his heir at law. *Elizabeth Cleaves* died, *March* 31ſt, 1769, leaving the defendant her only daughter, who married *Richard Mansfield*.—*John Phipard* died the 10th of *April* 1774, *without iſſue*, not having ſuffered a recovery of the part he took as tenant in tail under the will of *George Phipard*; but having made his will, and given all his real and perſonal eſtate, to the defendant and the plaintiff's children, *equally*: The queſtion was, Whether the plaintiff was entitled to *any* and *what* ſhare under the will of *George Phipard* deceaſed? That is, Whether there were *croſs-remainders* created by the will, or whether *William* was entitled to the *whole*, as *heir at law*, under the reverſion in fee?

Mr. *Wilſon*, for the plaintiff, after ſtating the caſe, ſaid, the rule of law was ſo fully ſettled againſt *preſuming* croſs-remainders in a will, where *more* than *two* take as tenants in common, that the ſingle queſtion for the conſideration of the court was, Whether there were any circumſtances apparent upon the face of the will, from whence it could be fairly collected, that the *intention* of the teſtator was to create croſs-remainders in this caſe? And as to that, he ſaid, he was unable to find out any circumſtances in it, ſimilar to thoſe, in which croſs-remainders had in other caſes been implied. In *Dyer* 303. *b. pl.* 49. the teſtator deviſed *two* parts of his eſtate to his *four* younger ſons in tail, and " if they *all die* without iſſue male, then " the ſaid *two parts* to revert to the teſtator's own right heirs." In that caſe, the court held, that the word " all," " if they *all* " die without iſſue," ſhewed his intention was, that no part ſhould revert, ſo long as there ſhould be any iſſue male of the ſurviving deviſee. So in *Holmes* verſus *Meynell*, *Raym.* 452. where the deviſe was of " *all* the teſtator's lands to his two " daughters and *their heirs*, equally to be divided between them; " and if they die, then *all* the ſaid lands were to go over;" the court ſaid, " it was plain that by, '*all* the ſaid lands,' the teſtator

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"tator meant the *whole* to go over at the *ſame* time, and not a "*moiety* at different times." But here the word "*all*" is not repeated in the deviſe over; nor is it ſaid "if *all* die without iſſue;" but the eſtate is given to the deviſees, as *tenants in common*, and not as *joint-tenants*; which words, as *effectually disjoin the title*, as if the teſtator had uſed the word "*reſpectively*," which clearly would have prevented croſs-remainders; and ſo it was expreſsly held, in *Cumber* v. *Hill*. 2 *Barnard*. 367, 443. 2 *Str*. 969. S. C. *Brown* verſus *Williams*, 2. *Str*. 996. and by Lord *Hardwicke* in *Davenport* verſus *Oldis*, 1 *Atkins* 579. In this laſt caſe, Lord *Hardwicke* alſo ſaid, "there could be no caſe cited where croſs-"remainders had been adjudged to ariſe merely upon the words "for want of ſuch iſſue." So that thoſe words are of no avail in this caſe (Lord *Mansfield*. When the word "*reſpectively*" is uſed, the words "want of iſſue" do not operate at all). In *Merriat* v. *Townley*, 1 *Vez*. 102. croſs-remainders were created by the words "joint-tenants, and no ſtreſs laid upon the words "*for want of ſuch iſſue*." If ſuch words alone are to create croſs-remainders, the old rule laid down in *Gilbert* v. *Witty*, 2 *Cro*. 655. and every other caſe, that they cannot be raiſed without expreſs words between *more than two*, will be inverted; and they will be implied in all caſes, where they are not expreſsly negatived.

Lord MANSFIELD.—My note of the caſe of *Davenport* v. *Oldis* is this: "The court held this not to be a croſs-remainder, be-"cauſe the words '*ſeveral and reſpective*' effectually *disjoin* the "title; and that the preſumption was as ſtrong in favour of the "wife, as in favour of all the reſt."

ASHHURST Juſtice.—Amongſt the different caſes of croſs-remainders in the books, is there any, where one of the deviſees was likewiſe the heir at law of the teſtator?

Serjeant *Groſe contra*, for the defendant, ſaid, he had no difficulty to admit the general rule contended for, that the legal preſumption is againſt raiſing croſs-remainders between *more than two*; if taken with the reſtriction annexed in the caſe of *Pery* v. *White* * (adjudged on *Friday* laſt) that ſuch preſumption may be *rebutted* by manifeſt circumſtances apparent on the face of the will. For here, the clear intention of the teſtator was evidently *againſt* ſuch preſumption. He had two brothers and a ſiſter, all equally near to him in point of relationſhip, and the deviſe is, "of all his lands," as in *Holmes* v. *Meynell*, to *them* and the *heirs of their bodies*, as tenants in common, and not

* *Supra*, 777.

as joint-tenants (not a *ſeparate* deviſe to *each*, as in *Gilbert* v. *Witty*, 2 *Cro.* 655.); and "*for want of ſuch iſſue*," *generally*, (*ſcil.* the iſſue named,) *not* "*the iſſue of their reſpective bodies*," as in *Cumber* v. *Hill*, *Brown* v. *Williams*, and *Davenport* verſus *Oldis*, he gives the reverſion to his own right heirs; not to his *brother*, who was *then* his heir at law. Nothing therefore can be ſo plain and evident, as that he looked forward to a diſtant period when *all* ſhould be dead without iſſue, and that then ſuch perſon as ſhould be his right heir ſhould take. He cited *Wright* v. *Holford*, *Eaſt.* 14 *Geo.* 3. *B. R.* * and *Doe ex dim. Burden* v. *Burville*, *Eaſt.* 13 *Geo.* 3. *B. R.* in which laſt mentioned caſe, croſs-remainders were implied between *more* than two. And concluded with praying, that the court would certify in favour of the defendant.

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* Supra, 31.

Lord MANSFIELD.—The reaſon given in the old caſes againſt raiſing croſs-remainders, to prevent the ſplitting of freeholds, had not very great weight at the time it was given, and certainly has not now. To be ſure, where they are to be raiſed between *two* and *no more*, the *favourable preſumption* is in *ſupport* of *croſs-remainders*: Where between *more* than *two*, the preſumption is *againſt* them; but the intention of the teſtator may defeat the preſumption in either caſe.—In *Davenport* verſus *Oldis*, where the queſtion was, whether croſs-remainders ſhould be raiſed between two only, Lord *Hardwicke*, by way of general obſervation, lays it down, "that the words, 'in default of ſuch iſſue,' "ſhall not merely in themſelves create croſs-remainders." But ſince that time, in the caſe of *Wright* v. *Holford* †, the court went expreſsly on the diſtinction of there being no words, ſuch as "*reſpectively*," to ſever the titles; but that the limitation over being "in default of *all* the iſſues," the rule of conſtruction laid down as between *two*, ſhould obtain. The caſe of *Wright* v. *Holford* therefore, upon *full conſideration* ſays, that theſe words ſhall lay ſuch a foundation as to create croſs-remainders; and in general, I believe, in deviſes of this kind, the intention of the teſtator is in favour of croſs-remainders. But there muſt be ſomething, ſome circumſtances manifeſting ſuch intention, to encounter the rule of law laid down in *Pery* v. *White*, on *Friday* laſt. In the preſent caſe ſee what the circumſtances are. The teſtator had two brothers and a ſiſter: If he meant his eſtate ſhould have gone to his heir at law there was no occaſion to make a will. Therefore it is clear he did not mean his brother *John* ſhould take it as heir, or that *William* ſhould do ſo; but he meant that his ſiſter ſhould be equally an object of his bounty.

† Supra, 31.

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It is as clear that he meant, no diviſion ſhould take place to create an inequality between them, till a failure of the heirs of *all* their bodies. He therefore begins with the diſpoſition thus; "As to all my temporal eſtate, I give my lands to my two "brothers and my ſiſter, and to the heirs of their bodies law-"fully begotten." Theſe are the words of an ignorant man, and the will is inaccurately drawn; for there cannot be a limitation to two brothers and a ſiſter, and to the heirs of their three bodies. The court therefore muſt mould them as near to the intent of the teſtator as they can. The lands, he ſays, are equally to be enjoyed by his brothers and his ſiſter, and the heirs of their bodies. He goes on to diſpoſe of the reſt of his worldly eſtate with the ſame intention: For he gives all his goods and chattels, both real and perſonal, equally to his two brothers and his ſiſter, ſhare and ſhare alike. It was impoſſible to have expreſſed his intention, that his ſiſter ſhould take equally with his brothers, more plainly. He meant his eſtate ſhould continue fettered with an entail, as long as the exiſtence of the perſons then in being, and their iſſue: And that his heir at law ſhould take nothing till after that entail was determined. Whereas, if the conſtruction were to be, that the heir at law ſhould take upon the failure of iſſue of any one, the elder or the younger brother, as the caſe might happen, would then take a fee in the ſhare of the deceaſed brother or ſiſter, and ſo create an inequality which the teſtator never intended to make. For it is limited to them and the heirs of their bodies, and for "want of ſuch iſſue." "Want "of iſſue," there plainly means, iſſue of all of them: How can it then be executed but by raiſing croſs-remainders. It ſeems to me as ſtrong a caſe as that of *Wright* v. *Holford*.

WILLES Juſtice.—I believe there are few caſes which come before the court, where croſs-remainders are not meant by the teſtator. The reaſon given in the old caſes for not allowing the implication of croſs-remainders, between more than two, is to prevent the ſplitting of tenures. The doctrine of feuds had a very good foundation, but when feuds ceaſed, the occaſion which gave riſe to the rules which they eſtabliſhed, introduced a great deal of nonſenſical reaſoning; and I wonder how it could have obtained in *Weſtminſter-Hall*, in theſe caſes; as croſs-remainders were allowed ſo long ago as the caſe in *Dyer* 303.—In later times the courts of law have ſaid, that where the intention of the teſtator is plain, croſs-remainders ſhall be implied. The queſtion here is, "Whether there are ſufficient words to create croſs remain-

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"ders?"—In the case which came before us on *Friday* last *, I examined the will very accurately, to see whether there were any words in it, which could shew that the intention of the testator was to create cross-remainders. But there were neither the words, "heirs of their bodies," nor "want of issue." In the present case, in the first place, the objects of the testator's bounty were all equally related to him, and it appears to be his intention that they should be equally benefited, both by his real and personal estate: for there are no words which shew a preference to any one in particular. It is argued, that the devise to the heir at law makes a preference; but our opinion is, that it is only superfluous. I do not rest much upon whether the word "*all*" which is relied on in some of the cases quoted, was annexed to the devise or the remainder. In *Davenport* v. *Oldis* there was the word, "respectively," therefore there was no occasion for Lord *Hardwicke* to have said any thing as to the words "for want "of such issue." That point was not properly before him. In *Wright* v. *Holford*, the court thought themselves bound by the words, "in default of such issue," and certified accordingly. These words are used here: the cases then are the same, with this difference only, that here, the cross-remainder is to be raised between *three*, instead of being raised between *two*. Wherever I can distinguish between the case of *two* and *three*, I will: but I see no ground in this case.

ASHHURST Justice.—The leaning of courts of justice ought always to be in favour of cross-remainders, because that construction is most consonant and agreeable to the intention of testators in general. I think the present is a case in which there are circumstances, that stand clear of all the circumstances which have occurred in former cases, where the same question has been litigated. For the limitation here, is the same as if the testator had said in express words, "With regard to all persons "mentioned in my will, I consider them equally as objects of my "bounty: But looking afterwards to the event of their issue "failing, in that case, I give my estate to my right heirs." His intention therefore was, to continue the estate fettered with an entail, till they and their issue were extinct; and consequently a contrary construction would be subversive of that intention.

BULLER Justice.—This case is perfectly consistent with the resolution of the court on *Friday* last; for there no intention appeared. *That* being so, the general rule laid down must govern:

* *Pery* v. *Wise*, *supra*, 777.

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This caſe ſtands equally clear of that rule. We have been preſſed with the caſe of *Davenport* v. *Oldis*. The words there, were applied to what went before in the will; for it was a caſe of intention only, which Lord *Hardwicke* collected from the other words, and he refers, "want of iſſue," to the word "*reſpectively*." There is another caſe, *Marriot* v. *Townley*, 1 *Vez.* 102. where Lord *Hardwicke* ſays, the words "for want of ſuch iſſue" muſt mean "*want of the iſſue of all*:" That therefore is an additional authority to the caſe of *Wright* v. *Holford*; and as there are no words to ſever this eſtate, I am of opinion, there ſhould be croſs-remainders.

Afterwards, on *May* 21ſt, in this term, the court certified in the following words.—"Having heard counſel on both ſides, "we are of opinion, that on the death of *John Phipard*, deceaſed, "*William Phipard* was entitled to *one moiety* of the ſhare of the "eſtate which the ſaid *John Phipard* took, under the will of "*George Phipard*, deceaſed, and no more."

Same day.

GOODRIGHT *ex dim.* WALTER *verſus* DAVIDS.

If leſſee *covenant* not to *under-let* without *conſent* of the leſſor, under *hand and ſeal*, with a power of re-entry, in caſe of a breach; *acceptance* by the leſſor, of *rent* due *after* the *condition broken*, with *full notice*, is a *waiver* of the forfeiture.

IN ejectment, the following caſe was reſerved for the opinion of this court.—The plaintiff declared on a demiſe from *Philip Walter*, dated the 30th of *September* 1776, to hold from the 29th of *September*, then laſt, for ten years. At the trial of the cauſe, before Mr. Serjeant *Sayer*, at the laſt lent aſſizes, at *Maidſtone*, for the county of *Kent*, it appeared, that the leſſor of the plaintiff, by indenture of the 26th of *July* 1762, demiſed the premiſes to the defendant for forty-one years, if he the ſaid *Walter*, the leſſor, ſhould ſo long continue rector of the pariſh of *Crayford*.—Among other things contained in the ſaid indenture, there was a covenant that the defendant ſhould *not under-let*, aſſign or transfer the premiſes, or any part thereof, *without* the *conſent* of the ſaid *leſſor* in writing, *under* his *hand and ſeal* firſt had and obtained; with a power of *re-entry* to the ſaid *Walter*, in caſe the defendant ſhould not obſerve the covenants in the ſaid leaſe.—It further appeared, by receipts produced and parol evidence that the defendants had under-let various parts of the premiſes in queſtion, to ſeveral tenants for ſome years; but that the plaintiff's leſſor knew of ſuch under-lettings, *all* which were *previous* to *Michaelmas* 1775. The laſt receipt for rent paid by the defendant, was dated *March* 25th, 1777, "for

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"rent due to the plaintiff's leſſor at *Michaelmas* preceding." The under-letting to Mrs. *Ware*, an under-tenant to the ſaid defendant, was before *Michaelmas* 1775, and continued at the time of the ejectment brought. A verdict was found for the plaintiff, ſubject to the opinion of the court on the following queſtions: Whether a forfeiture was incurred by the under-letting? And if it were, Whether the ſame were waved by, or under the circumſtances aforeſaid?

Mr. *Morgan* for the leſſor of the plaintiff argued, that the under-letting in the caſe ſtated, being an immediate forfeiture of the leaſe, the ſubſequent poſſeſſion could only be, as tenant by ſufferance. If ſo, the receipt of rent from the defendant, *after that* time, could not alone amount to a waver of the forfeiture, any more than a ſubſequent receipt of rent is of itſelf a waver of a notice given to quit *. But clearly, to make it a waver in this caſe, there ought to have been an acquittance *under hand and ſeal*; the terms of the covenant being expreſsly, "that the defendant ſhould *not under-let* without "licence *under hand and ſeal*." Therefore he prayed judgment for the plaintiff.

Mr. *Thornton contra*, for the defendant, contended, that the leaſe, in this caſe, being *voidable* only, and *not void*, the acceptance of rent, *after notice* of the *condition broken*, was clearly a *waver* of the forfeiture. It is true, the leſſor muſt have notice of the condition broken; and the day of payment muſt have paſt; but where theſe circumſtances concur, it is immaterial whether the forfeiture is for non-payment of rent, or for any other breach. The great point is, whether the leaſe be *voidable* only, or abſolutely *void*. In the *firſt* caſe, acceptance of rent will effectually *cure the forfeiture*; in the *latter*, it will *not*. And ſo are all the caſes in the books. *Lit. Sect.* 341. and *Coke*'s Commentary upon it, 211. *b.* are in point. The latter ſays, "if the leſſor "*accept rent due* at a day *after*, he ſhall not enter for the condition "broken, becauſe he thereby affirmeth the *leaſe* to have *continu-* "*ance*." And again, *page* 215. *a.* "where the eſtate is *ipſo facto* "*void* by the condition or limitation, *no acceptance* of rent *after* "can make it have a continuance—*Otherwiſe* it is, of an eſtate "or leaſe *voidable by entry*." The ſame point is alſo expreſsly laid down in *Pennant*'s caſe, 3 *Co.* 63. *b.* Upon theſe authorities therefore, he prayed judgment for the defendant.

* *Vide ſupra*, 243. Doe *ex dim.* Cheny *v.* Batten, *Hil.* 15 *Geo.* 3.

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GOODRIGHT *verſus* DAVIDS.

Lord MANSFIELD.—This caſe is extremely clear: To conſtrue this acceptance of rent *due ſince the condition broken*, a *waiver* of the forfeiture, is to conſtrue it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it; but accepts rent ſubſequently accrued. That ſhews he meant the leaſe ſhould continue. Caſes of forfeiture are not favoured in law; and where the forfeiture is once waved, the court will not aſſiſt it. The conſequence is, that there muſt be judgment for the plaintiff.

Thurſday, May 21ſt.

STEVENSON *et al. verſus* MORTIMER.

If *exorbitant* fees are taken by a cuſtom-houſe-officer from the *maſter* of a veſſel, upon his taking out a *cocquet* and bond, purſuant to the ſtat. 13 & 14 *Car.* 2. *c.* 11. *ſect.* 7; tho' the ſtatute impoſes the duty on the *maſter, perſonally*, the *owners* may recover the exceſs, in *aſſumpſit* for *money had and received.*

UPON ſhewing cauſe why the nonſuit directed in this caſe ſhould not be ſet aſide, and a new trial granted, the caſe appeared to be as follows: It was an *action for money had and received*, brought by the plaintiffs, as *owners* of a boat employed in carrying chalk and lime, from one part of the coaſt of *Suſſex* to another, *viz.* from *Eaſt Bourne*, to *Haſtings*: and the action was brought to recover the whole, or part, of certain ſums of money paid by the *maſter* of the boat, who was the plaintiffs' *ſervant*, to the defendant, a cuſtom-houſe-officer, as his fees, due upon the maſter's taking out a *cocquet* and *bond*; under an idea that this boat came within the proviſions of the ſtat. 13 & 14 *Car* 2. *c.* 11. *ſect.* 7. by which it is enacted, "that no goods "ſhall be ſhipped, or put on board, to be carried forth *to the* "*open ſea* from any port or place, &c. to any other port or place "of the realm, without a ſufferance or warrant firſt had and ob- "tained; and that the maſter of every ſhip or veſſel, who ſhall lade "or take in any goods, &c. in any port, member, or creek, within "the kingdom, to be landed or diſcharged in ſome other port, "member, or creek, ſhall, *before* the ſhip or veſſel be removed or "carried out of the port where he ſhall take in ſuch lading, *take* "*out a cocquet*, and become *bound* in a certificate with good "ſecurity, in the value of the goods, for delivery thereof, in the "*port* or *place* for which the ſame ſhall be entered; and to return "a certificate of their being ſo landed, upon pain of forfeiting the "penalty of the bond."—The queſtion intended to have been tried was, Whether a *cocquet* was neceſſary to be taken out under the ſtat. 13 & 14 *Car.* 2. for goods carried *coaſtwiſe?* But, before the trial, the plaintiffs *gave notice*, that they alſo meant to go upon the

the ground of the defendant having taken *exorbitant fees*: He had demanded and received 14 *s.* and 6 *d.* 1778.

ST IVEN ON *et al. versus* MORTIMER.

Mr. Serjeant *Sayer*, before whom the cauſe was tried, was of opinion, that this duty being impoſed by the ſtatute upon the *maſter*, the action was *wrong brought*, in the *name* of the *owners*, and accordingly nonſuited the plaintiffs.

Mr. *Wallace*, Mr. *Rous*, and Mr. *Morgan*, who ſhewed cauſe, argued, that the nonſuit was right upon *two* grounds. 1. Becauſe the uncertainty and ſurpriſe to which this ſpecies of action expoſes a defendant, made it an improper action to try the right. To this purpoſe, they cited *Lindon* v. *Hooper*, *Hil.* 16 *Geo.* 3. *B. R.* * where it was determined, "that a right of "common could not be tried in an action for money had and "received:" And ſaid, this caſe was even ſtronger; becauſe here, the payment was entirely *voluntary*, at the maſter's own requeſt; and the officer bound to act. 2. The taking out a *cocquet*, *&c.* was a *perſonal duty* impoſed by the ſtatute *on the maſter*, under a ſevere penalty in caſe of neglect; therefore, he alone, if any one could be, was entitled to maintain this action. The words of the ſtatute are, "that the *maſter* of every ſhip," *not*, "the *owners* of the veſſel, ſhall *&c.*" conſequently, the latter have nothing to do with it. Here, the whole tranſaction was with the maſter only. He applied to the officer, requeſted the *cocquet*, *&c.* and paid the fees. Therefore, if wrong paid, he alone could be entitled to recover the money back.—They ſuggeſted further, that the ground of extortion was a *ſurpriſe* upon the defendant.

Lord *Mansfield*, without hearing the counſel on the other ſide, delivered his opinion as follows.—The ground of the nonſuit at the trial was, that this action could not be well maintained by the plaintiffs, who are the *owners* of the veſſel in queſtion; but it ought to have been brought by the *maſter*, who actually paid the money. *That* ground, therefore, makes now the only queſtion before us: As to which, there is not a particle of doubt. *Qui facit per alium, facit per ſe.* Where a man pays money by his *agent*, which ought not to have been paid, either the agent, or principal, may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent. If money is paid to a known agent, and an action brought againſt him for it, it is an anſwer to ſuch action, that he has paid it over to his principal. *Sadler* v. *Evans*, 4 *Bur.*

* *Supra*, 414.

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1984. Here the ſtatute lays the burthen on the *maſter* from neceſſity; and makes him perſonally liable to penalties if he neglects to perform the requiſitions of it. But ſtill he is entitled to charge the neceſſary fees, *&c.* upon his doing ſo, to the *account* of his *owners*. And in this caſe, there can be no doubt of the relation in which the maſter ſtood to the plaintiffs; for he is the *witneſs*, and he ſwears, that the money was *paid* by the *order* of the *plaintiffs*. Therefore, they are very well warranted to maintain the action.—If the parties had gone to trial upon an apprehenſion that the only queſtion to be tried was, Whether this was a caſe within the act of parliament, conſequently, whether any fee was due; the plaintiff could not have been permitted to ſurpriſe the defendant at the trial, by ſtarting another ground, upon which to recover a *Norfolk groat*. An action for money had and received is governed by the moſt liberal equity. Neither party is allowed to entrap the other in *form*. But here, the plaintiff gave *notice*, that he meant to inſiſt that too much was taken; and therefore, both came to the trial with equal knowledge of the matter in diſpute. Therefore, the rule for a new trial muſt be abſolute.—Lord *Mansfield* added, that he thought, the plaintiffs ought to let the defendant know the amount of the exceſs which they claimed; that the defendant might have an opportunity of paying money into court; and the rule was drawn up accordingly.

Same day.

FURNEAUX *verſus* HUTCHINS.

In a queſtion upon the *cuſtom* of tithing in the pariſh of *A.*; *evidence* that ſuch a cuſtom exiſts in the *adjacent pariſhes*, is *not admiſſible*.—*Secus*, if the cuſtom be *laid* as the *general* cuſtom of the *whole county*.

UPON ſhewing cauſe why a new trial ſhould not be granted, the caſe, by the report, appeared to be as follows: This was an action for not carrying away tithes of barley. Plea, that they were not duly ſet out. Replication, ſetting forth a cuſtom, "that when twenty ſcoves of barely were fit to "carry, the farmer always took eighteen, which made, a horſe-"load, and left *two* for the parſon." Rejoinder, that there was no ſuch cuſtom, and iſſue thereon. The cauſe was tried before Mr. Baron *Hotham*, at the laſt aſſizes at *Exeter*, for the county of *Devon*, when the queſtion made, was, Whether the rector was bound to take his tithe as ſoon as any part was ſet out; or, Whether the farmer was bound to ſet out the tithe of the *whole field*, before any part was taken away? The evidence on the part of the plaintiff was, that a former incumbent, about fifty

years

years before, had *two* years together carried the tithes away, as soon as any part was ſet out; after which time, a compoſition had been agreed upon, and had continued to the preſent time. That the field in queſtion was *hilly*, and the barley ripened faſter in one part of the field than in another; and if not cut partially, great part would be ſpoiled. Evidence was alſo given, that this was the cuſtom in the *adjacent pariſhes*. 1778.

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The counſel for the defendant called no witneſſes; but reſted his caſe; 1. Upon the weakneſs of the evidence given on the part of the plaintiff, in ſupport of the cuſtom: and 2. Upon the unreaſonableneſs of it, ſuppoſing it to be a cuſtom. The jury found a verdict for the plaintiff, againſt the inclination of the judge.

Mr. *Mansfield* and Mr. *Morris* ſhewed cauſe; and Serjeant *Davy* argued in ſupport of the rule.

Lord MANSFIELD.--Proof of the cuſtom in other pariſhes, is no evidence to affect the pariſh in queſtion, unleſs the cuſtom had been laid as a general cuſtom of the whole county. Then, as to its being the cuſtom of this pariſh, there is not the ſmalleſt proof of it. I think it a wrong verdict, againſt the opinion of the judge, and the juſtice of the caſe. Therefore, let there be a new trial, without coſts.

N. B. Upon a new trial the jury found the ſame verdict. After which, the court refuſed to grant a third.

ATKYNS *verſus* ATKYNS.

Friday, May 22d.

THIS was a caſe out of *Chancery* for the opinion of this court, ſtating in ſubſtance, as follows: That *Edward Atkyns*, father of the plaintiffs and defendant, being ſeiſed for life, with remainder to his firſt and other ſons, in tail male, of a real eſtate, at *Ketteringham*, in the county of *Norfolk*, of the annual value of 2000 *l.*: And being alſo ſeiſed in fee of the *manor of Coates*, in the *county of Glouceſter*, and to an eſtate there, called *Pinbury* Park, of the annual value of 143 *l.* 3 *s.* ſubject to a clear annuity of 120 *l.* during the life of Mrs. *Fonnereau*; and being likewiſe ſeiſed and entitled to the *reverſion in fee*, under the will of Sir *Robert Atkyns* the elder, *of* and in the *manor of Lower Swell*, in the ſaid *county of Glouceſter*, and to divers meſ-

One ſeiſed for *life*, with remainder *in tail* to his *firſt* and other ſons, of a conſiderable eſtate in the county of *Norfolk*;—being alſo ſeiſed in fee of the *manor* of C. and a *ſmall eſtate* at *P.* in the county of *Glouceſter*, and entitled to the *reverſion* in fee of *another eſtate* in *that county*, after ſeveral eſtates tail in different perſons, one of whom had a ſon aged eighteen years; deviſes "*all* that his *manor* of C. &c. and alſo *all* that his capital meſſuage, and *all* and every his lands, tenements, and hereditaments whatſoever, *ſituate* and *being*, *in* or near *P.* or *elſewhere* in the ſaid *county of Glouceſter*, to his executors, *upon truſt* to *ſell*, and to *divide* the money ariſing from the ſame *equally* among his *younger* children," of which he had *three*. Held, this *remote reverſion* paſſed to the truſtees.

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ſuages, lands, tenements, and hereditaments, there and in *Upper Swell*, and alſo *Stow-on-the-Wold*, in the ſame county, ſubject to ſeveral eſtates tail in three different perſons, one of whom had a ſon about eighteen years of age: and the ſaid *Edward Atkyns* the father, having a wife and four children, *viz.* the defendant, not ſix years of age, his eldeſt ſon, and tenant in tail of the ſaid eſtate in *Norfolk*, and the plaintiffs, *John* and *Mary Atkyns*, and alſo another ſon, ſince deceaſed; by his will, bearing date the 19th of *April* 1763, deviſed as follows: "I give, "deviſe, and bequeath, all that the manor or lordſhip of *Coates*, "in the county of *Glouceſter*, with the rights, royalties, and "appurtenances, and alſo all and every the meſſuages, farms, "lands, tenements, advowſons, and hereditaments whatſoever, "of me the ſaid *Edward Atkyns*, ſituate, lying and being with-"in, or adjoining to the ſaid manor or lordſhip; and alſo all "that my capital meſſuage or tenement, and all and every my "lands, tenements, and hereditaments whatſoever, whether free-"hold or leaſehold, ſituate and being at, in, or near *Pinbury* "Park, or *elſewhere in the ſaid county of Glouceſter*, with their ap-"purtenances; and all my eſtate, term of years, and intereſt "therein, unto and to the uſe of my executors, their heirs, ex-"ecutors, and adminiſtrators reſpectively; *upon truſt* to *ſell* the "ſame, and place out the purchaſe monies on government or "real ſecurities, at intereſt, and to ſtand poſſeſſed of the princi-"pal monies, in truſt for *all* and *every of his children*, whether "male or female, (other than and except his eldeſt ſon only,) "*to be equally divided between them*, if more than one, ſhare and "ſhare alike, to be paid when he or they ſhall ſeverally attain "their reſpective ages of twenty-one years." The queſtion was, "Whether the *reverſion in fee* of and in the manner of "*Lower Swell*, and other the premiſes there and in *Upper Swell*, "and *Stow-upon-the-Wold*, did paſs by the will of the teſtator, "*Edward Atkyns*, the plaintiff's late father, to, and thereby be-"came veſted in, *Dorothy Atkyns*, *John Wright* junior, and *John* "*Liotard*, the defendants, in truſt for the ſaid teſtator's young-"er children?"

Mr. *Davenport*, for the plaintiffs, ſtated the queſtion to be, Whether the reverſion in queſtion paſſed by the general words "*elſewhere in the county of Glouceſter?*" And he argued, that it did paſs. It was clear the teſtator had a power to diſpoſe of it. The only queſtion therefore was, Whether it could neceſſarily be inferred from any thing apparent on the face of the will, that the teſtator did not mean this reverſion ſhould paſs?

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The contrary clearly appeared. 1. From the ſituation and circumſtances of the teſtator and his family. For the defendant, his eldeſt ſon, if he ſurvived his father, neceſſarily would come to the *Norfolk eſtate*, worth 2000 *l. per annum*: Seeing that he was ſo amply provided for, it was moſt natural the teſtator ſhould give all he could diſpoſe of amongſt his younger children, of whom he had three. And if this reverſion did not paſs to them, nothing paſſed as a preſent proviſion, except about 13 *l. per ann.* It would be abſurd, therefore, to ſuppoſe the teſtator meant to give them no more. 2dly, He contended, that the words uſed were clearly ſufficient, in point of law, to paſs the reverſion in queſtion. To this purpoſe he cited *Hawes* v. *Coney*. *Cro. El.* 159. *Dalby* v. *Champernon*, *Skin.* 631. *Rook* v. *Rook*, 2 *Vern.* 461. *Cheſter* v. *Cheſter*, 3 *P. Wms.* 56. and *Freeman* v. *Duke of Chandos*, *Mich.* 16 *Geo.* 3. *B. R. ſupra*, 363. He added, that in the caſe of *Strong* v. *Teat*, 2 *Bur.* 912. a general ſweeping clauſe, giving "*all other* the lands, tenements, and hereditaments," in *two* counties before-named in the will, were held "not to paſs a "*reverſion in fee*, which the teſtator was entitled to, in one of "them, under his marriage ſettlement:" and poſſibly that caſe would be cited againſt him. But there, from the whole tenor and complexion of the will, it clearly appeared to be the *intention* of the teſtator that the reverſion ſhould *not* paſs. Here, it as clearly appears to have been the intention, that the reverſion in queſtion *ſhould* paſs; therefore, the plaintiffs are entitled.

Mr. *Howorth*, *contra*, for the defendant, contended, that the court would require the cleareſt intention poſſible on the face of the will; otherwiſe the words, however comprehenſive, could not afford a ground for diſinheriting the heir. *That* is the rule of law. As to the intention then, it is manifeſt from the terms of the deviſe, that the teſtator meant to give his younger children that which was *ſaleable* only, and which could be turned into money: But a reverſion after an eſtate tail in three different perſons, one of whom had a ſon then eighteen years of age, was ſo remote a contingency, it could be worth nothing. Beſides, the very attempt to ſell would have defeated the ſale; by prompting the tenants in tail to ſuffer recoveries. It is improbable, therefore, for the teſtator to have had this reverſion in contemplation at the time; and if he had, it is too abſurd to ſuppoſe he would have given ſuch a direction to his truſtees, as muſt effectually defeat his intention. If it was not his intention, the words, though ever ſo clear, will not paſs it: and to this purpoſe, he cited *Strong* v. *Teat*, 2 *Bur.* 912.

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Lord MANSFIELD.—The queſtion is, Whether the word "*elſewhere*," ſhall be conſtrued to have any meaning, or none at all? The teſtator had two ſons and a daughter. The eldeſt ſon was provided for by the ſettlement, to the amount of 2000 *l. per annum*, independently of his father, who had very little to give his younger children; hardly enough to keep them from ſtarving. The intention of his will was, to give them all he had in the world. He firſt gives them all his perſonal eſtate. His real eſtate was of two ſorts; the manor of *Coates* and *Pinbury*, and the reverſion in queſtion, after three eſtates tail, one of the tenants in tail having a ſon then eighteen years of age. Both theſe eſtates together amounted but to a trifle. Suppoſe the teſtator did not know of this reverſion; or if he did know of it, he might not know it was worth any thing. But this he might think of: That whatever he had in the world he would give to his younger children. He is ſtudious to uſe words to paſs every thing; and if this is not included, there is nothing for the words to operate upon: For except the eſtates of *Coates* and *Pinbury*, he had nothing but this reverſion in the county of *Glouceſter*. It is contended, that the word "elſewhere" means nothing. Now, confining it to the county of *Glouceſter*, ſhews he had ſome imperfect idea, at leaſt of this reverſion, or he would have ſaid "elſewhere in the kingdom of *England*," or uſed ſome ſuch general expreſſion. It is not poſſible, if he knew of this reverſion, that he ſhould not charge it for the benefit of his younger children, when it came into poſſeſſion. The doctrine in *Strong* v. *Teat* is not to be denied: But the intention is to be collected from the whole of the will taken together; and from thence the court is to determine, Whether the words mean a *local* deſcription, or a *general* deſcription of every thing? If the teſtator had had any other lands in the county of *Glouceſter*, there might have been ſome doubt. But that is not the caſe.

Willes and *Aſhhurſt* Juſtices, were of the ſame opinion.

Buller Juſtice.—This deciſion is perfectly conſiſtent with the determination in *Strong* v. *Teat*; and the caſe of *Freeman* v. The Duke of *Chandos**, is in point: For there it is ſaid, though ſo remote a reverſion might not be particularly thought of, yet as the general words were ſufficient to include *all*, and the intention of the parties was to include all, it ſhould paſs.

*&*ſupra*, 363.

Afterwards, on *Tueſday*, *May* 26th, in this Term, the court certified in theſe words, "We are of opinion that the reverſion "in fee of the manor of *Lower Swell*, and other the premiſes

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" there and in *Upper Swell*, and *Stow-on-the-Wold*, did pass by " the express words of the will of the testator, *Edward Atkyns*, " the plaintiffs' late father, to the trustees in the will named, " in trust for the said testator's younger children."

On *Tuesday*, the 28th *July* 1778, the cause came on to be heard before the *Lord Chancellor*, on the certificate of the Judges of the *King's Bench*, when his Lordship was pleased to order, that their certificate should be confirmed.

The defendant appealed to the *House of Lords*; when the question sent for the opinion of the court of *King's Bench*, was put to all the Judges; and the Lord Chief Baron of the Court of *Exchequer* delivered their unanimous opinion upon it, in the *affirmative*. Whereupon it was ordered and adjudged, that the appeal should be dismissed, and the decree complained of affirmed.

SUTTON *versus* SUTTON.

THIS was a case out of *Chancery* for the opinion of this court; stating in substance as follows: That *Robert Sutton*, being seised in fee of a house in *Bath*, and of divers other freehold estates of the yearly value of 300 *l.* and of other freehold estates of the yearly value of 500 *l.* in remainder, after the death of his father, on the 27th of *February* 1771, made his will duly attested; and thereby gave unto *John Bright* and *George Dunstan*, all his lands in possession, reversion, or remainder, *except the house at* Bath, *upon trust* to *sell*, and dispose of the said lands, and to place the monies arising therefrom upon government or real security; and by, and out of the interest, dividends, and produce arising therefrom, to pay to his wife, *four hundred pounds* a year, in lieu of so much a year, which she would be entitled to by their marriage settlement. And he gave to his wife, *in satisfaction of the remaining* 50 *l.* which she could claim by the settlement, *his house in Bath* for her *life*, and, after her death, to his eldest son. After reciting his wife's being *enseint*, he gave to such child, whether son or daughter, 3000 *l.* to be paid out of the monies arising by the sale of the lands, and to be paid at his or her age of twenty-one. He did further by his will direct, that when the estates by him directed to be sold, were actually sold, and the monies arising from them invested in the said securities, that 100 *l.* a year should be given to his wife, for the bringing up of his daughter *Elizabeth Mary*, and *any after born*

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born child; and if his ſaid daughter, *or ſuch after-born child*, ſhould happen to die before his or her legacy ſhould become due, that then ſuch legacy ſhould ſink into the *reſiduum*, for the benefit of his ſon.—After ſome pecuniary legacies, he gave the reſt, reſidue, and remainder of his eſtates, or monies not before diſpoſed of, to his ſon; but *in caſe he ſhould die before twenty-one, without iſſue*, he then gave and bequeathed the ſame reſiduary eſtate *to the child with which his wife was enſeint, if a ſon, as his own for ever: But in caſe ſuch child ſhould prove a daughter*, then he gave the ſame reſiduary eſtate between his *two* daughters as tenants in common. At the time of making his will, the teſtator had *a ſon*, and *a daughter*; and his wife was *enſeint* with another child (a daughter), afterwards named *Julia Margaretta*. After the date of the will, the teſtator *ſold his houſe in Bath*, and had *two* daughters born; *Julia Margaretta*, and *Auguſta Ann Sutton*. After the ſale of the houſe in *Bath*, and the birth of his two daughters, the teſtator, in his own hand, made the *following alterations* in his will; but the making thereof was *not atteſted*, nor was the will *republiſhed*.—In the deviſe to *John Bright* and *George Dunſtan*, the *exception of the houſe in Bath* was *ſtruck out*. In declaring the truſts of that deviſe, ſo far as related to his wife's annuity, he *interlined* the word "*fifty*," ſo that the annuity was altered to 450 *l*. *The bequeſt to his wife of the houſe in* Bath, *was* STRUCK OUT, *and the remainder to his ſon.* The *recital of his wife's being enſeint, and the legacy of* 3000 *l. were* STRUCK OUT; and inſtead thereof, he inſerted theſe words; "*I give to* "*my two daughters* Julia Margaretta *and* Auguſta Ann Sutton, "2000 *l. each.*" In the direction for bringing up his daughters, he made the word "daughter," *daughters*; and inſtead of the words "*after born child*," he inſerted the words, "*Julia Mar-*"*garetta* and *Auguſta Ann Sutton.*" In the clauſe reſpecting the lapſe of the legacies, the word "*daughter*" was made *plural*, the words "*after born child*" were STRUCK OUT, and, inſtead of "*his or her*," the word "*their*" was inſerted. He alſo made alterations as to his pecuniary legacies.—The *reſiduary deviſe* to the *child of which the wife was enſeint*, was likewiſe STRUCK OUT, and inſtead of the word "*two*," before "*daughters*," he ſubſtituted the word "THREE."—The queſtion referred to the opinion of the court was, Whether, by the will of the teſtator, as *altered, obliterated*, and *interlined* by him, any, and what part, of the real eſtate therein mentioned, paſſed thereby to any perſon, and to whom?

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I was not preſent at the argument of this caſe: But I have been favoured with a ſight of ſeveral notes of it, from which it appears, that the queſtion made on the part of the plaintiff was, Whether the alterations and obliterations in the will did not amount to a *total revocation of it*, with reſpect to the *real eſtate?* The bequeſts moſt materially to be affected by ſuch a conſtruction, were the *legacies* of 2000 *l.* to *each of the daughters:* As to them, the court declined giving any opinion, whether they were void, or not; recommending the deciſion of that point to be deferred, till ſuch time as the plaintiff, the teſtator's only ſon, an infant, ſhould come of age.—But as to the deviſe to the truſtees to ſell, they were clearly of opinion, it was *not revoked*; and agreeably to that opinion, certified to the court of *Chancery* in the following words*: "We are of opinion, that the deviſe of the real "eſtates to the truſtees, to be ſold and converted into money, is "not revoked, but continues in full force."

May 26th.

WILLET *verſus* CHAMBERS.

Saturday, May 23d.

THIS was an action for money had and received to the plaintiff's uſe, brought againſt the defendant, as *ſurviving partner* of one *Dadley*. Plea, *non aſſumpſit*. Verdict for the plaintiff, damages 480 *l.*

If *two* are *partners*, as *attornies* and *conveyancers*, and one receive money to be laid out on mortgage, the *other* is *liable* for the amount, tho' his partner gave a *ſeparate receipt* for it.

Upon a rule to ſhew cauſe why a new trial ſhould not be granted, the facts appeared to be as follow: That *prior* to any partnerſhip between the defendant and *Dadley*, who was an *attorney* and *conveyancer* at *Coventry*, the *latter*, in the year 1771, received of a Mr. *Bindley*, the ſum of 350 *l.* to be laid out on a real ſecurity: *Dadley* accordingly furniſhed him with a mortgage from a Mr. *Hughes* to that amount; which, as it afterwards appeared, *Dadley* had *forged*. At *Midſummer* 1776, *Dadley* and *Chambers* entered into partnerſhip: Shortly after which, *Bindley* wanted to call in his money. The pretended mortgagor was ſuppoſed at the ſame time to want a further ſum of 150 *l.* which, added to the original mortgage money, made together the ſum of 500 *l.* The plaintiff *Willet* was ready to advance this ſum: And, in conſideration of his doing ſo, an aſſignment was made to him of the pretended mortgage, before made to *Bindley*. As to 180 *l. part* of this ſum of 500 *l. Willet* paid it into *Dadley*'s office, to *Chambers*, who gave the following receipt for it: "Received of Mr. *Benjamin*

"*Willet*

law is againſt him, will be much greater than that which will be ſuſtained by the plaintiff if he fails. It is indeed ſo hard a caſe upon the defendant, that every leaning of the court would be in his favour. But the queſtion is, "Whether, in *point of* "*law*, this engagement with *Dadley* does not make *Chambers* "anſwerable?"

To go by ſteps.—It is neceſſary to ſee what the buſineſs was, which *Dadley* carried on alone, before his connection with the defendant in the year 1776. By admiſſion of the counſel on oth ſides, it was the buſineſs of an *attorney* and *conveyancer*. y proof in the cauſe, it appears to have been a *great deal more*. or he had *many appointments*, though the nature of them is ot particularly mentioned. He had alſo *agencies*, and was *clerk a navigation*. But there is no pretence that he ever received *ocuration money*. The buſineſs of conveyancing, in the very ture of it, as carried on in the country, is this: Where there is attorney or counſel of credit, they receive money to place out on ſecurities; and perſons who want to borrow, as well as oſe who want to lend, apply to them for that purpoſe. Their *fit* ariſes from *having the money* in their hands, before it is laid upon the intended ſecurities; and from *their fees and bill of rges* upon the conveyances they draw. It is not diputed that this was the nature of *Dadley*'s conveyancing buſi- s: He did not act however as a ſcrivener, who ſometimes s not touch the money; but who in all caſes gets *procuration ey*. There is no proof of any tranſaction of that kind; nor ed is it cuſtomary for attornies like him to do ſo; for they profit enough without it. I remember a caſe before me of a on who was truſted to the amount of many thouſand pounds, ne manner I have ſtated; and *that* is the nature of the neſs.

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Serjeant *Hill* and Mr. *Green*, who ſhewed cauſe, argued, that this was not diſtinguiſhable from the common caſe of a ſurviving partner, who is always liable to partnerſhip debts.

Mr. *Wallace*, Mr. *Newnham*, Mr. *Dunning*, and Mr. *Wheler*, *contra*, in ſupport of the rule, contended, that this tranſaction was not within the compaſs of the partnerſhip, which was for the purpoſe of carrying on the buſineſs of *attornies only*; not that of *ſcriveners*. A money ſcrivener is a perſon who receives money for the purpoſe of deriving ſome advantage from the receipt of it. But a mere conveyancer, as ſuch, is by no means a money ſcrivener. His buſineſs is only to draw deeds and writings for the transfer of property from one man to another; and his profit ariſes from his bill of fees and charges for ſo doing. The two branches therefore, though it may happen that they are ſometimes exerciſed by the ſame perſon, are in themſelves totally diſtinct and ſeparate. If ſo the fact of their being united in the partnerſhip carried on between the defendant and *Dadley*, ought to have been *proved*; whereas, the reverſe is the truth of the caſe. For it is admitted they took no procuration money, and there is no evidence of any profit from the money in their hands. On the contrary, all that *Chambers* received, was punctually *paid over* to *Bindley*: That alone therefore would be an anſwer to the preſent demand. The receipts they gave, were ſeparate; *not* "for *partner and ſelf*;" but "*for* "*which I promiſe to account.*" In ſhort, the whole of the tranſaction was entirely foreign to the partnerſhip, and what *each* did, plainly ſhewed he conſidered the part he took in it, as his own ſeparate act and deed only. Therefore, they prayed the rule might be made abſolute.

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Serjeant *Hill* and Mr. *Green*, who shewed cause, argued, that this was not distinguishable from the common case of a surviving partner, who is always liable to partnership debts.

Mr. *Wallace*, Mr. *Newnham*, Mr. *Dunning*, and Mr. *Wheler*, *contra*, in support of the rule, contended, that this transaction was not within the compass of the partnership, which was for the purpose of carrying on the business of *attornies only*; not that of *scriveners*. A money scrivener is a person who receives money for the purpose of deriving some advantage from the receipt of it. But a mere conveyancer, as such, is by no means a money scrivener. His business is only to draw deeds and writings for the transfer of property from one man to another; and his profit arises from his bill of fees and charges for so doing. The two branches therefore, though it may happen that they are sometimes exercised by the same person, are in themselves totally distinct and separate. If so the fact of their being united in the partnership carried on between the defendant and *Dadley*, ought to have been *proved*; whereas, the reverse is the truth of the case. For it is admitted they took no procuration money, and there is no evidence of any profit from the money in their hands. On the contrary, all that *Chambers* received, was punctually *paid over* to *Bindley*: That alone therefore would be an answer to the present demand. The receipts they gave, were separate; *not* "for *partner and self*;" but "*for* "*which I promise to account.*" In short, the whole of the transaction was entirely foreign to the partnership, and what each did, plainly shewed he considered the part he took in it, as his own separate act and deed only. Therefore, they prayed the rule might be made absolute.

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Mr. *Wallace*, Mr. *Newnham*, Mr. *Dunning*, and Mr. *Wheler*, *contra*, in ſupport of the rule, contended, that this tranſaction was not within the compaſs of the partnerſhip, which was for the purpoſe of carrying on the buſineſs of *attornies only: not* that of *ſcriveners*. A money ſcrivener is a perſon who receives money for the purpoſe of deriving ſome advantage from the receipt of it. But a mere conveyancer, as ſuch, is by no means a money ſcrivener. His buſineſs is only to draw deeds and writings for the tranſfer of property from one man to another; and his profit ariſes from his bill of fees and charges for ſo doing. The two branches therefore, though it may happen that they are ſometimes exerciſed by the ſame perſon, are in themſelves totally diſtinct and ſeparate. If ſo the fact of their being united in the partnerſhip carried on between the defendant and *Dadley*, ought to have been *proved*; whereas, the reverſe is the truth of the caſe. For it is admitted they took no procuration money, and there is no evidence of any profit from the money in their hands. On the contrary, all that *Chambers* received, was punctually *paid over* to *Bindley*: That alone therefore would be an anſwer to the preſent demand. The receipts they gave, were ſeparate; *not* "for *partner and ſelf*;" but "*for* "*which I promiſe to account.*" In ſhort, the whole of the tranſaction was entirely foreign to the partnerſhip, and what each did, plainly ſhewed he conſidered the part he took in it, as his own ſeparate act and deed only. Therefore, they prayed the rule might be made abſolute.

Lord MANSFIELD.—Both parties in this caſe undoubtedly are innocent; and the loſs that will fall upon the defendant, if the law

law is againſt him, will be much greater than that which will be ſuſtained by the plaintiff if he fails. It is indeed ſo hard a caſe upon the defendant, that every leaning of the court would be in his favour. But the queſtion is, "Whether, in *point of* "*law*, this engagement with *Dadley* does not make *Chambers* "anſwerable?"

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To go by ſteps.—It is neceſſary to ſee what the buſineſs was, which *Dadley* carried on alone, before his connection with the defendant in the year 1776. By admiſſion of the counſel on both ſides, it was the buſineſs of an *attorney* and *conveyancer*. By proof in the cauſe, it appears to have been a *great deal more*. For he had *many appointments*, though the nature of them is not particularly mentioned. He had alſo *agencies*, and was *clerk to a navigation*. But there is no pretence that he ever received *procuration money*. The buſineſs of conveyancing, in the very nature of it, as carried on in the country, is this: Where there is an attorney or counſel of credit, they receive money to place out upon ſecurities; and perſons who want to borrow, as well as thoſe who want to lend, apply to them for that purpoſe. Their *profit* ariſes from *having the money* in their hands, before it is laid out upon the intended ſecurities; and from *their fees and bill of charges* upon the conveyances they draw. It is not diputed but that this was the nature of *Dadley*'s conveyancing buſineſs: He did not act however as a ſcrivener, who ſometimes does not touch the money; but who in all caſes gets *procuration money*. There is no proof of any tranſaction of that kind; nor indeed is it cuſtomary for attornies like him to do ſo; for they get profit enough without it. I remember a caſe before me of a perſon who was truſted to the amount of many thouſand pounds, in the manner I have ſtated; and *that* is the nature of the buſineſs.

This was the buſineſs of *Dadley*, *before the partnerſhip*. Let us ſee then, what was the nature of the partnerſhip, afterwards entered into between *Dadley* and the preſent defendant; whether it was *a general partnerſhip* in *all Dadley*'s buſineſs, or *confined* to *one particular branch* of it only; for to be ſure, there *may be* ſuch a *confined partnerſhip*. The evidence as to this point conſiſts in the heads and terms of an agreement entered into between them, which were afterwards extended and reduced into form. From them it appears, there was no particular reſtriction; it was not to be confined to ſuits, nor conveyancing only, but they were to be *partners in the buſineſs* which Mr. *Dadley* carried on.

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on. Each was to be worth a certain ſum.—The profits are ſtated at 800 *l.*—Then it is agreed that a proviſion ſhall be made for the family of whichever of them ſhould happen to die firſt. And then comes the following *clauſe* at the end, which, though not taken notice of by the counſel on either ſide, is very material indeed upon this occaſion. My object in examining it particularly, was to ſee whether it contained any reſtriction. The clauſe is this: "*Note*, this ſcheme of partnerſhip is intended to include *all* Mr. *Dadley*'s preſent and future practice and appointments, ſuch as *agencies*, *navigation-clerk*, &c.: But *not* to extend to any *public* office or place, which may at any future time be given to either of the parties." The only reſtriction therefore is that; or more properly ſpeaking, it is the only exception to this general partnerſhip.

Thus the partnerſhip commences, without waiting for articles; and from that time, the *buſineſs* was carried on in partnerſhip. One branch of that buſineſs was *conveyancing*. Incident to *conveyancing* is the *receiving of money* to place out upon ſecurities. Receiving it *from the lender* to advance to the *borrower*, and acting for both parties reſpectively. From that the profit ariſes; not from *procuration money*, but from the money lying in their hands before it is placed out; and when placed out, from the charges and fees for drawing and engroſſing the conveyances.

The facts then are ſhortly theſe:—The plaintiff *Willett*, wanting to place out a ſum of 500 *l.* applies to the office without making any diſtinction between the two partners. The firſt ſum he advances is 180*l.* This he pays to *Chambers* who gives a general receipt for it, not expreſſing it to be for *Dadley*, or for whatever whoſe uſe; but making himſelf accountable for the amount on demand. He receives it therefore as the *principal*, *not* as the *agent* of *Dadley*: And it is admitted he knew the uſe, by placing it out upon the ſecurity for which it was put into his hands. The next ſum, which was 300 *l.* is paid by the plaintiff to *Dadley*, who receives it exactly in the ſame manner as *Chambers* did the former ſum, as *principal*, and gives a receipt for it, not as for ſo much money to be placed out, but as the ſum for which he was to be accountable. The two ſums together come within 20 *l.* of what was wanted upon the ſecurity.—Afterwards the bill for conveyancing is brought in. *Hughes* being the original mortgagor, if he had not been a fictitious perſon, and had wanted a further ſum of money upon the aſſignment, *he* ſhould have paid the expence of conveyancing. But the bill is brought in

in, to the plaintiff, and made out "debtor to *Chambers* and "*Dadley*." *Chambers* receives the money, and gives a receipt for it. In that tranſaction therefore, he is clearly conſidered *as a partner*, and the tranſaction itſelf as a *partnerſhip tranſaction*. If *Dadley* had received procuration money, and that kind of dealing had been excepted out of the articles; or, if ſeparate accounts had been kept of the money got by theſe tranſactions, and it had all been ſet down to the profits of *Dadley* only, it might have varied the caſe: And Mr. Juſtice *Aſhhurſt*, who tried the cauſe, would have been very glad to have given a direction in favour of the defendant. He ſuffers by the raſcality of a man who had a very good character. I am very ſorry for the defendant; but upon this evidence I cannot ſay, but that it is a *partnerſhip tranſaction*.

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Mr. *Newnham* informed the court, that the bill included other buſineſs as well as the particular tranſaction of the mortgage.

Lord MANSFIELD ſaid, *that* proves nothing, but that in general they were partners in the fees of conveyancing.

Per Cur. Rule for a new trial diſcharged.

POWER *verſus* WELLS.

Same day.

Idem *verſus* Eundem.

UPON ſhewing cauſe againſt a new trial, in the above cauſes, Mr. Juſtice *Aſhhurſt*, before whom they were tried, reported as follows:

If money and a horſe are given in exchange for another horſe *warranted ſound*, which was *unſound* at the time, an action for *money had and received* is *not* a *proper* action to try the *warranty*.—Nor will *trover* lie for the *horſe* given in *exchange*; becauſe the *property* is *altered*.

The *firſt* was an action for *money had and received*, brought to recover a ſum of twenty-one pounds paid by the plaintiff upon the exchange of a mare of his, for a horſe of the defendant; which the defendant *warranted* to be ſound; but which was clearly proved to be unſound at the time. Immediately upon diſcovering that the horſe was unſound, the plaintiff ſent it back, together with a letter by a perſon who put the letter and halter into the defendant's hands in the defendant's yard, but he refuſed to take them. The perſon at the ſame time demanded the twenty guineas and the plaintiff's mare given in exchange; but the defendant ſaid he had ſold her, that he would have nothing to do with the perſon ſent by the plaintiff, and turned him out of his yard. Upon which the plaintiff brought both the above actions.

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The *ſecond* was an action of *trover* for the mare: Both cauſes ſtood for trial in the paper together. As to the firſt, an objection was made at the trial to the form of the action, and I was very doubtful how far it was maintainable. But it was agreed that I ſhould ſum it up to the jury, and if they ſhould be of opinion with the plaintiff upon the facts proved, then, inſtead of making a ſpecial caſe, it ſhould be put in the form of a motion for a new trial. The jury found for the plaintiff. As to the ſecond action, it was agreed that a verdict ſhould be taken for the plaintiff upon the evidence given in the firſt cauſe, but with liberty to move for a new trial; and it was underſtood between the parties, that the defendant ſhould be entitled to the ſame redreſs in both cauſes, in caſe the opinion of the court ſhould be in his favour, as if the whole had been ſtated in the form of a caſe.

Upon ſhewing cauſe, the queſtion was, Whether the above actions were rightly conceived? or, Whether the plaintiff ſhould not have brought a ſpecial action on the caſe? Mr. *Wheler* for the plaintiff. Mr. *Newnham* for the defendant.

The *court* were of opinion that *both* actions were *miſconceived*. 1ſt, The action for *money had and received*, with *no other count*, was an *improper* action to try the *warranty**. 2d, The action of *trover* could not be maintained, becauſe the property was *transferred* by the *exchange*.—Accordingly a nonſuit was ordered to be entered up in both cauſes.

* Vide *Stuart* v. *Wilkins*, *Dougl. Rep.* 18. and *note* the *difference* between a count for money had and received *only*, and an action of *aſſumpſit* to try the *warranty*.

COOKE *verſus* BOOTH.

Tueſday, May 26th.

THIS was a caſe out of *Chancery* for the opinion of this court, ſtating in ſubſtance as follows: That *Robert Booth*, by indenture, demiſed certain premiſes to one *Otho Cooke*, for the

A. demiſed to *B.* for the lives of the ſaid *B.* and of *C.* and *D.*, and *covenanted*, that if the ſaid *B.*, his heirs, &c. ſhould be minded at the deceaſe of the ſaid *B. C.* and *D.*, or any of them, to ſurrender the ſaid demiſe, and take a *new leaſe*, and thereby add *a new life* to the then *two* in being, in lieu of the *life* ſo dying that then he the ſaid *A.* his *heirs*, &c. upon payment for *every life* ſo to be added, in lieu of the life of *every of them* ſo dying, would grant a *new* leaſe for the lives of the *two* perſons named in the former leaſe, and of ſuch *other perſon* as the ſaid *B.*, his heirs, &c. ſhould appoint in lieu of the *perſon* named in the preceding leaſe, as the ſame ſhould *reſpectively* die, *under the ſame rent and covenants*.—There had been *ſucceſſive renewals* from the time of a former leaſe granted by the anceſtor of *A.*; and in *each*, a like covenant for renewal. *Held* that *A.* and his anceſtors had, by their *own acts*, conſtrued this to be a covenant for a *perpetual renewal*.

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lives of the said *Otho Cooke*, *Elizabeth Cooke*, and *Robert Cooke*; and the said *Robert Booth* thereby covenanted as follows; "that "if the said *Otho Cooke*, his heirs and assigns, shall be minded, *at "the decease of the said O. C., E. C. and R. C. or any of them*, to "surrender this present indenture, and take a new lease of the "said premises, and thereby add *one new life* to the then *two* in "being, *in lieu of the life so dying*; that *then* the said *R. B.* his heirs, "*&c.* upon request, on such surrender of the lease then in being, "and upon payment of one broad piece of gold of twenty-two "shillings value, or twenty-two shillings in silver, to the said "*R. B.* his heirs, *&c. for every life* so to be added in lieu of "the life of *every of them* so dying, and at the proper costs of "the said *Otho*, without demanding any further fine for the "same, shall and will grant and *execute* unto the said *Otho Cooke*, "his heirs, *&c.* a *new* lease, for the *lives* of the *two* persons "named in the *former* lease as shall be then living, and of such "*other person*, as the said *Otho Cooke*, his heirs or assigns, shall "nominate and appoint, in lieu of the person named in the pre-"ceding lease, as the same shall respectively happen to die, un-"der the beforementioned annual rent, and the *same covenants "therein contained.*"—This lease bore date the 22d of *December* 1749, and there had been *successive renewals* containing the same *clause of renewal*, from the time of a former lease, granted by the ancestor of the said *Robert Booth*, bearing date the 3d of *August* 1688, down to the date of the lease in question: *viz.* A renewal by the said *Robert Booth* in the year 1725; another on the 9th of *November* 1746; another on the 1st of *February* 1748, which was granted to the said *Otho* upon the same lives as the lease in question; and then the present lease was granted.—In *January* 1773, the said *Otho Cooke* died; whereupon the plaintiff, his widow, and *Robert Cooke*, his eldest son, (since deceased,) became entitled, as devisees under the will of the said *Otho*, to the leasehold premises for their joint lives. Shortly after, a new lease, in precisely the same terms as the lease of the 22d of *December* 1749, was tendered to the defendant to execute for the lives of the said *Elizabeth* and *Robert Cooke*, and *also* for the life of *James Cooke*: But the defendant refused to execute it. Soon after, *Robert Cooke*, another life named in the said lease of 1749, died: whereupon, another indenture in the like words, except that the name of *Mary Cooke* was inserted instead of *Robert Cooke*, was tendered to the defendant, who refused to execute it, because it contained a covenant for renewal

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on the death of *James* and *Mary Cooke*, who were not any of the lives named in the original leaſe of 1749: But he was willing to renew, on the death of *Elizabeth Cooke*, for the lives of the ſaid *James* and *Mary*, and for ſuch other perſon as the repreſentatives of *Otho* ſhould nominate, in lieu of the ſaid *Elizabeth*, and for the life of the longeſt liver of them the ſaid *James* and *Mary*, and ſuch other perſon ſo nominated, on payment of twenty-two ſhillings, and ſubject to the rents and covenants in the original leaſe; but not to renew any farther. The queſtion was, Whether the leaſe ſo tendered, or offered to be executed by the defendant *John Gore Booth*, be an execution of the covenant in the ſaid leaſe, dated the 22d of *December* 1749?

Mr. *Wilſon* for the plaintiff ſtated the queſtion to be, Whether the defendant, as deviſee of *Robert Booth* the leſſor, was bound to add any covenant for renewal after the death of *Mary Cooke*? or in other words, Whether this were a covenant for a *perpetual renewal?* And he contended it was. In *Ireland* ſuch covenants are frequent: And the caſe of *Bridges* verſus *Hitchcock*, *Dom. Proc.* 15th *June* 1715, and *Furnival* v. *Crewe*, 3 *Atk.* 83. ſhew that ſuch a covenant is not illegal in *England*. The queſtion then is, Whether the leſſor has or has not made ſuch a covenant? As to that, he certainly has covenanted, that the ſame covenants as were in the old leaſe ſhould be inſerted in the new leaſe. It cannot therefore be preſumed, that the covenant for renewal was not in the contemplation of the parties: And if it was, it is clear they muſt have intended it to be *general*, or it would have been reſtrained. But it is clear from the terms of the covenant, that it was intended to be general: For it is not confined to the lives named in the original leaſe of 1749; but the words are, "that he will grant a new leaſe for the lives "of the *two* perſons named in the former leaſe, and *of ſuch other* "*perſon* as ſhall be nominated in lieu of the life named in the "preceding leaſe, as the ſame ſhall *reſpectively die*, under the "*ſame covenants*. He cited the caſes of *Bridges* verſus *Hitchcock** "and *Furnival* verſus *Crewe*, beforementioned; and concluded

* The demiſe in that caſe was of a *mill*; and the covenant as follows: "That "if the leſſee, his executors, &c ſhould before the expiration of the term be "minded to renew, then upon application, &c. the leſſor, his heirs or aſſigns, "ſhould grant ſuch further leaſe as ſhould by the leſſee, his executors, &c. be "deſired, *without any fine to be demanded* therefore, and under the *ſame rents and co-* "*venants only*, as in this leaſe." *Vide* this caſe, *Brown's Parl. Caſ. vol.* 1. *p.* 522.

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with hoping that the court would incline in favour of the plaintiff. 1778.

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Mr. *Arden contra*, contended, that the covenant could not be extended further than an agreement to renew upon the death of each of the three lives named in the leaſe of *December* 22d, 1749. He agreed ſuch a covenant was not in itſelf illegal: But it was eſſential that there ſhould be a mutuality of advantage; whereas, here all the advantage was on the ſide of the leſſee. He ſaid, the caſes of *Bridges* verſus *Hitchcock* and *Furnival* verſus *Crewe*, were diſtinguiſhable from the preſent, and the latter indeed rather in favour of the defendant; for there the determination of Lord *Hardwicke* was grounded upon the words "and ſo to *continue* renewing, *&c. from time to time.*" Here, the words are not ſo general: Beſides the covenants on the part of the leſſee in the original leaſe are totally inconſiſtent with a perpetual right to renew; for ſome of them are, that he will *leave certain things on the premiſes*. He cited *Hyde* verſus *Skynner*, 2 *P. Wms.* 196. to ſhew, that the court in general would lean againſt perpetual leaſes: And *Ruſſel* v. *Darwin*, 1ſt *July* 1767, *coram* Lord *Camden*, where the demiſe was "for 99 years, or three lives, if they ſhould ſo long live." The leſſor covenanted, that he would, upon the death of *either* of the parties, add a new life, upon payment of 150 *l.* if one only ſhould die; 500 *l.* if two, and 1,100 *l.* if all *three* died, at and under the *like rents and covenants*. Lord *Camden* held, that the leſſor was under no obligation to renew for more than three lives, and that the covenant of renewal need not be inſerted.

Lord MANSFIELD.—The queſtion in all theſe caſes is, Whether "under the *ſame rents and covenants*" ſhall be conſtrued *incluſive* or *excluſive* of the clauſe of renewal. And arguments drawn from every part of the agreement are material. Here, the parties themſelves have put the conſtruction upon it: for there have been frequent renewals, and in all of them the covenant of renewal has been uniformly repeated. How then ſhall the court ſay the contrary?

WILLES Juſtice.—The act of the parties ſeems to difference this caſe from all the caſes cited. Here, there have been four or five renewals, all in the ſame terms. I do not think otherwiſe, that *Furnival* verſus *Crewe* would be a ſufficient authority alone to determine this caſe; becauſe there, the additional words "and ſo to *continue* renewing, *from time to time*, were inſert-"ed." But the caſe of *Bridges* verſus *Hitchcock* is very much the

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ſame as this. For there, the words were, "under the ſame "rents and covenants," and no other words. I cannot ſay that in this country this kind of leaſe ſhould be much favoured, though the inducement for granting them in *Ireland* may be a very good one.

ASHHURST Juſtice.—I think this is a very hard caſe on the part of the leſſor, and there does not ſeem any mutuality as in the caſes of improvement of lands. But as there have been four ſucceſſive renewals, the leſſor himſelf has put his own conſtruction upon the covenant: and therefore is bound by it.

BULLER Juſtice.—I think the caſe of *Bridges* verſus *Hitchcock* decides this: In that caſe, both the Houſe of Lords and the Exchequer determined, that the words, "*under the ſame rents* "*and covenants*" in the *new leaſe*, contained a *perpetual covenant* to renew. So here, I think they muſt be conſtrued to mean a like covenant to renew.

Afterwards, on *Saturday*, *May* 30th, in this term, the court *certified* in theſe words: "We are of opinion, that a like cove- "nant for renewal, ought to be inſerted in the new leaſe; "conſequently, that the leaſe offered to be executed by the "defendant, *John Gore Booth*, is not an execution of the co- "venant in the leaſe, dated the 22d day of *December* 1749."

MARTIN *verſus* O'HARA.

Saturday, *May* 30.

A *ſecond* commiſſion againſt a bankrupt, *pending* a *former*, under which he has *not* obtained his *certificate*, is *void*. Where a bankrupt is clearly entitled to his diſcharge, he need *not* be *ſurrendered* by his bail: the court will, *in the firſt inſtance*, order an *exoneretur* to be entered on the bail-piece.

THIS was a rule to ſhew cauſe why an *exoneretur* ſhould not be entered on the bail-piece, the defendant having become bankrupt ſince the cauſe of action, and obtained his certificate. The defendant, in *July* 1775, carried on the trade of a linen draper, and lived in *London*. In *March* 1776, he became bankrupt, and was refuſed his certificate; before which bankruptcy the cauſe of action aroſe. The defendant then went to *Briſtol*, where he entered into partnerſhip with one *James Wright*, a dealer in cheeſe; and half a year after, became bankrupt again. Under this ſecond commiſſion, which was taken out at *Briſtol*, and which the creditors in *London* knew nothing of, he obtained his certificate.

Mr. *Wallace*, who ſhewed cauſe, argued, that the bankrupt not having obtained his certificate under the firſt commiſſion, the whole proceedings under the ſecond, were void. Conſequently the certificate could be no bar to the action.

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Mr. *Dunning contra*, contended, that if the ſecond commiſſion were irregular, the only mode of defeating it was by application to the Great Seal to ſuperſede it. But that there was nothing in the ſtatutes againſt bankrupts which prevented a perſon from having the full benefit of his certificate, however irregular the proceedings might be, as long as they continued in force: And that this was not the proper mode to try whether they were legal or not.

Lord MANSFIELD.—This is an application to the equitable juriſdiction of this court. Formerly the method was, for the bail to ſurrender the defendant, and then for him to apply to be diſcharged upon an affidavit, ſtating the fact of his having become bankrupt ſince the cauſe of action aroſe, and obtained a certificate of his conformity to the commiſſion. But of late, where a bankrupt is clearly entitled to his diſcharge, the court, to avoid circuity, have ordered an *exoneretur* to be entered on the bail-piece, without the *form* of a regular ſurrender of the bankrupt by his bail.—Here it is clear that the bankrupt himſelf would not have been entitled to his diſcharge, if ſurrendered: and the bail can never be in a better ſituation than the principal. An uncertificated bankrupt is incapable of trading or contracting for *his own benefit*. All the property he acquires, belongs to his creditors. If he cannot trade for himſelf, he cannot be the object of a ſecond commiſſion. 2. The proceedings in this caſe under the laſt commiſſion are manifeſtly a groſs fraud and contrivance, on the face of them. The defendant, a *linen-draper* in *London*, after being a bankrupt there, goes to *Briſtol*, changes his trade, and enters into partnerſhip with a *cheeſe-monger*; and within *ſix months* after, breaks again. A ſecond commiſſion is taken out; not in *London*, where his former creditors would have heard of it, but at *Briſtol*, where it might be conducted without their knowledge: And under this commiſſion he obtains his certificate. The whole proceeding is a groſs fraud. Even ſuppoſing the creditors under the firſt commiſſion had been informed of *this*, and had been inclined to prove their debts under it, they could not have done ſo. Therefore, diſcharge the rule.

BULLER Juſtice.—I take it to be perfectly clear, that a *ſecond* commiſſion cannot be taken out againſt an *uncertificated* bankrupt; and for this reaſon: It would be entirely idle and nugatory. Becauſe all his effects belong to his creditors under the firſt: And I take this to have been determined in the caſe of a

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lighterman, where the aſſignees under the firſt commiſſion recovered a lighter, built by the bankrupt, (being uncertificated,) after a *ſecond* commiſſion ſued out *.

Per Cur. Rule diſcharged.

* *Vide Evans* verſus *Mann*, *ſupra*, 569. but no mention is there made of a *ſecond* commiſſion.

Sam day.

AVERY *verſus* HOOLE.

Declaration, that the defendant uſed a gun, *being an engine to kill and deſtroy the game.* Held *good, after verdict. Quære*, if good upon a *ſpecial demurrer.*— A verdict will cure *ambiguity*; but it will not aid a caſe, where the *giſt* of the action is *omitted.*

THIS was an action of debt on the game laws, for uſing a gun to kill and deſtroy the game. Plea not guilty: and iſſue thereon. At the trial before Mr. Juſtice *Gould*, on the Northern Circuit, an objection was taken to the declaration, becauſe it ſtated only, that the defendant uſed a gun, *being an engine to kill and deſtroy the game*, without averring that he *uſed* it *for the deſtruction of the game*: Mr. Juſtice *Gould* thought the objection was *on the record*; therefore, proceeded to try the cauſe, and the jury found a verdict for the plaintiff.

Mr. *Arden*, on *Thurſday*, *May* 6th, in this Term, moved in arreſt of judgment, upon the ground above mentioned; and cited the caſe of *Rex* verſus *Hunt*, *Paſch.* 15 *Geo.* 3. *B. R. Rex* v. *Gardiner*, 2 *Str.* 1,090.

Mr. *Wallace* and Mr. *Bolton* now ſhewed cauſe, and inſiſted, that this being after trial, the objection was cured by the verdict. In effect, however, the offence was ſufficiently charged. For if the words, "being an engine," were read, as they ought to be, in a *parentheſis*, the reſt would be an expreſs averment, "that "the gun was uſed *to deſtroy the game.*" The caſes of *Rex* v. *Hunt*, *Eaſt.* 15 *Geo.* 3. *B. R.* and *Rex* v. *Gardiner*, 2 *Str.* 1,090. *Andrews*, 255. *S. C.* cited in ſupport of the motion, were caſes of *convictions*. The *latter* was held bad, becauſe the defendant was convicted of *keeping* only, not of *uſing*: And the *former* was *given up without argument*. But admitting it had been argued, a conviction and declaration are very different. In *Bluet* v. *Needs*, *Comyns*, 522. it was expreſsly held to be *matter of evidence* for the jury, Whether a gun is an engine to kill and deſtroy the game? and here the jury have pronounced it ſo. The rule in criminal as well as in civil caſes is, that a verdict will ſupply whatever muſt of neceſſity be given in evidence. To this purpoſe they cited *Alſton* verſus *Buſcough*, *Carth.* 304. and *Frederick* v. *Lookup*, 4 *Burr.* 2,018.

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The latter was an action *qui tam*, for treble the value of money won at play, brought by the plaintiff, on behalf of himſelf and the *poor of the pariſh of Covent Garden*; and the offence was charged only, at *Weſtminſter aforeſaid*, without ſpecifying any pariſh: And after verdict for the plaintiff was adjudged good. Here, the objection is after verdict; and therefore cured.

Mr. *Arden*, *contra*, in ſupport of the rule, contended, that where a declaration does not contain a ſufficient charge, *verdict* will not help it; and here no offence is charged. All the precedents agree, that the *deſtruction of the game* muſt be referred to the *uſe*, and not to the *engine*: And there is no difference as to the ſenſe of the words, whether they are contained in a declaration or a conviction. In *Burenden* v. *Sharp*, 2 *Salk.* 662. which was an action for keeping a vicious bull, the *ſcienter* being omitted in the declaration, was held naught *after* verdict. In *Reaſon* v. *Liſle*, *Comyns*, 576. the judgment was arreſted, becauſe it was only charged in the declaration that the defendant uſed *a dog* to kill game, without ſhewing that it was any of the dogs *deſcribed by the act*. And in *Hooker* v. *Wilkes*, 2 *Str.* 1,126. it was decided, that this being a penal ſtatute, could not be extended by implication. Upon theſe authorities, he prayed the rule might be made abſolute.

Lord MANSFIELD.—The caſe of *Rex* v. *Hunt* was given up without argument.—What paſſed at the trial in this caſe is material; and ſhews the true diſtinction. No objection was made at *Niſi Prius*, that the evidence did not prove the offence; but the objection was, that the offence was not charged in the declaration with ſufficient certainty. The judge anſwered, that the objection, if founded at all, appeared *on the record*, and therefore he would try the cauſe according to that conſtruction which conſtitutes the offence. It has been very truly ſaid, that a verdict will not mend the matter, where the giſt of the action is not laid in the declaration. But it will cure ambiguity. Here, according to one method of pointing the ſentence, putting a comma after the word "engine," the offence is ſufficiently charged; for it will then ſtand thus: "That the defendant uſed a gun being an engine for the deſtruction of the game." And there is no charge in the declaration but according to that conſtruction. This differs widely from the caſe of a conviction; for there,

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great nicety is required. The court must see that the offence is within the jurisdiction of the justice, and that he has pursued his authority. The case of *Frederick* v. *Lookup*, is very strong; because there it was absolutely necessary that the offence should be committed *in the Parish*, to entitle the plaintiff to recover; and *must have been so proved*: After verdict therefore for the plaintiff, the court held it was cured. So here the *use* must have been *proved* at the trial, or the verdict could not have been found for the plaintiff. It might have been different, perhaps, if this ambiguity had been assigned as special cause of demurrer.

Per Cur. Rule for arresting the judgment discharged.

THE END OF EASTER TERM.

On the 3d of *June* 1778, the Great Seal was delivered to *Edward Thurlow*, of the *Inner Temple*, Esq; his Majesty's Attorney General, with the style and dignity of Lord Chancellor. Upon this occasion he was created a peer, by the title of Lord *Thurlow*, Baron of *Ashfield*, in the county of *Suffolk*.

Mr. *Wedderburne*, Solicitor General to his Majesty, succeeded Lord *Thurlow* as Attorney General.—And *James Wallace*, Esq; one of his Majesty's counsel learned in the law, was appointed Solicitor General, in the room of Mr. *Wedderburne*.

TRINITY TERM

18 GEORGE III. *B. R.* 1778.

BOLOGNE *verſus* VAUTRIN.

Friday, June 19th.

THE clerk of the attorney for the defendant in this cauſe, appeared in court to juſtify as bail for him; but was rejected as an improper perſon, upon the principle of the rule of *Mich.* 14 *Geo.* 2. ordering "that no attorney ſhall be admitted as bail "in any action depending in this court."

The attorney's clerk is an improper perſon to be bail for the defendant.

MICHELL *verſus* NEALE *et uxor.*

Tueſday, June 23d.

THIS was an action of aſſault and battery. The declaration conſiſted of *three* counts. In the *two* firſt it was charged, that the defendants on the 6th of *May* 1777, and on *divers other days and times from and between* that day and the commencement of the plaint, made an aſſault, *&c.*: and in the *third*, that on the ſaid *ſeveral days and times, or on ſome or one of them*, the defendants made an aſſault, *&c.*: The defendants *demurred*, and aſſigned for ſpecial cauſe, that the aſſault ought to have been charged on a day certain, and not with a *continuando*.

Declaration that the defendant on the 6th of *May*, and on *divers other days and times, between* that day and the commencement of the ſuit, *aſſaulted* the plaintiff, is *bad*.

Mr. *Morgan* in ſupport of the demurrer argued, that the offence being one *ſingle act*, could not be laid with a *continuando*; that no plea but the general iſſue could be put in to ſuch a declaration; and cited *Butler* verſus *Hedges*, 1 *Lev.* 210. *Gillam* verſus *Clayton*, 3 *Lev.* 93. *Brook* v. *Biſhop*, 2 Ld. *Raym.* 823. 2 *Salk.* 639. S. C. *Monchton* verſus *Paſhley*, 2 Ld. *Raym.* 976. 2 *Salk.* 638. S. C.

Mr. *Bower*, *contra*, for the plaintiff, admitted the *laſt* count could not be ſupported; but as to the *firſt* he ſaid, there was a difference between a *continuando*, and *diverſis diebus et vicibus*.

Here,

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Here the defendants might have pleaded *not guilty* as to *all* the aſſaults but *one*, and have juſtified as to that one; as in treſpaſs, *quare clauſum fregit*, where a *new aſſignment* may be made to one treſpaſs, and not guilty pleaded to the reſt. *Sed per curiam, non allocatur.* An aſſault is *one entire individual act*; and cannot be committed at *divers* times. Beſides, it is impoſſible for a defendant upon ſuch a declaration as this, to know whether the plaintiff means to prove one aſſault only, or twenty: Therefore he cannot be prepared to juſtify.

Per Cur. Judgment for the defendants.

Saturday, June 27th.

An attorney convicted of *felony* was ſtruck off the roll, though he had been burnt in the hand and ſuffered impriſonment purſuant to his ſentence, *five years* before, and no miſconduct imputed to him ſince.—He is an unfit perſon to practiſe as an attorney.

Ex parte BROUNSALL.

THIS was an application to the court to ſtrike the defendant off the roll of attornies, he having been convicted of ſtealing a guinea; for which offence he received ſentence to be branded in the hand, and to be confined to the houſe of correction *nine* months.

Mr. Solicitor General, who ſhewed cauſe, ſtated, that the conviction, which was the ground-work of the motion, was at leaſt four or five years ago: ſince which time no miſconduct whatever could be imputed to the defendant: and he argued, that the defendant having received the benefit of clergy and having been branded in the hand, it operated as a ſtatute pardon; therefore, to comply with the application would be to puniſh the defendant a ſecond time for the ſame offence. He cited *Serle* v. *Williams*, *Hob.* 288. where it was held, "that a clergyman could not be "deprived for a felony, for which he had received the benefit of "clergy:" And *Hobart* ſaid, "that an action would lie againſt "any perſon for calling him a thief," as was reſolved in *Cuddington* v. *Wilkins*, *Trin.* 13 *Jac.* 1*. He cited alſo Sir *T. Raym.* 370. Mr. *Le Blanc*, in ſupport of the motion, ſtated, that this was a proſecution by the magiſtrates of the county, and not by the proſecutor of the indictment for the felony. And that the only object of it was to prevent the neighbourhood from receiving any injury.

Lord MANSFIELD.—This application is not in the nature of a ſecond trial or a new puniſhment. But the queſtion is, Whether, after the conduct of this man, it is proper that he ſhould continue a member of a profeſſion which ſhould ſtand free from all ſuſpicion. Suppoſe he had been a juſtice of peace, the con-

* *Vide* this caſe, *Hobart*, 81.

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viction itself would not remove him from the commission; but could there be a doubt that he ought to be struck out of the commission? As at present advised, I am of opinion, without any doubt, that the rule should be made absolute. But as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the judges.—Lord *Mansfield* on this day said, "We have consulted all the judges upon this case, and they are unanimously of opinion, that the defendant's having been burnt in the hand, is no objection to his being struck of the roll. And it is on this principle; that he is an unfit person to practise as an attorney. It is not by way of punishment; but the court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not. Having been convicted of felony, we think the defendant is not a fit person to be an attorney. Therefore let the rule be made absolute."

REX *versus* ROWLAND PHILLIPS.

Same day.

If an officer on the impress service fire *in the usual manner* at the *ball-yards* of a boat, in order *to bring her to*, and kill a man, it is only *manslaughter.*

UPON an indictment against the defendant, at the *Lent* assizes, at *Exeter*, for the county of *Devon*, 1778, for the murder of *William Collier*, the jury at the trial before Mr. Baron *Perryn*, found a special verdict, stating in substance as follows: "An order of council for impressig seamen. A warrant made "in consequence of it to captain *Milbank*, commander of his Ma- "jesty's ship *Princess Royal*, who, by indorsement deputed *John* "*Nasmith*, fourth lieutenant of the *Princess Royal*, to execute it. "That *William Collier*, the deceased, was a fisherman: The de- "fendant was a midshipman belonging to the *Princess Royal*, "and on the 25th of *September* 1777, was sent in the brig *Hope* "(a tender) commanded by lieutenant *Nasmith*, into *Torbay*, to "impress seamen. That he went from the tender into a boat, by "the directions of the lieutenant, to put people on board the fish- "ing boats as they returned from sea, who might carry them "under the stern of the tender that the lieutenant might examine "whether they had any protections. That he put *Francis Graham*, a "quarter-master, on board the boat or smack of the deceased; that "the smack at first made a feint of proceeding towards the tender; "but instead of continuing in that course, she afterwards put out "to sea, with the said *Francis Graham* on board. That *Graham* "then

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" then waived his hat, by way of ſignal of diſtreſs, and for aſ-
" ſiſtance: Upon which the defendant went on board another
" fiſhing-boat, with the quarter-maſter as his aſſiſtant, armed
" with a muſquet and ball, and two cutlaſſes; and *gave chace* to
" the deceaſed for *three hours*; in the courſe of which time, the
" defendant fired ſix or ſeven ſhots, at the diſtance of a quarter
" or half an hour between each, *for the purpoſe of bringing the*
" *ſmack of the deceaſed to.* That the *hallyards* of the ſmack had
" been cut by *Francis Graham*, and that the ſmack was in the
" act of lying to. That *within the diſtance of ſixty yards*, the
" defendant fired a muſquet loaded with ball, *the ſea then run-*
" *ning very high*, and *ſhot* the *deceaſed* on the left ſide of his head.
" That *Francis Graham* was at that time ſtanding cloſe to the
" deceaſed. That the defendant ſaid, 'if they did not bring
" to, he would fire at *the man at the helm*; but if he could get
" *Graham* out of the veſſel, he might go to hell.' That before
" the defendant fired the muſket, the maſter of the *Induſtry*
" fiſhing-boat deſired him not to fire, but the defendant did
" fire; the deceaſed fell, and then one *John Deſent* ſaid, 'you
" have killed a man:' Upon which the defendant ſaid, 'do you
" think I meant it.' That before the laſt firing, a *ſtruggling* was
" ſeen between *Francis Graham* and the deceaſed, and that there
" was an apprehenſion *Graham* would have been thrown over-
" board: That a hat and four bludgeons were ſeen floating on
" the ſea. That the defendant fired from a muſquet loaded with
" ball, *as is uſual in the navy, to bring the ſmack of the deceaſed to*
" and to *hit the hallyards.*"

No counſel appeared on the part of the proſecution.

Mr. *Baldwyn* for the priſoner argued, that the facts found, amounted only to *manſlaughter*. To conſtitute murder, there muſt be malice, either *expreſs* or *implied*. Lord *Coke*, 3 *Inſt.* 47. defines murder thus: " When a perſon of ſound memory and diſcre-
" tion, unlawfully killeth any reaſonable creature in being under
" the King's peace, with *malice aforethought* either *expreſs* or *im-*
" *plied:*" And according to Lord *Hale*, *vol.* 1. 449. " murder is
" killing a man of *malice prepenſe.*" But the unfortunate act here, has nothing of expreſs or implied malice within the above definition. There is no appearance of ill-will to the deceaſed. The firing was not done in an uncommon manner, or with unuſual weapons. He cited *Hawk. Pl. C.* 85. *ſect.* 50. and *Kelyng*, 60.

Lord MANSFIELD.—It is impoſſible upon this ſpecial verdict to ſay, that the defendant is guilty of more than manſlaughter.

For

For it is expreſsly found, that he fired in the *uſual manner to bring veſſels to*, and to *hit the hallyards*. 1778.

Whereupon, the defendant was immediately arraigned, and upon praying the benefit of clergy, Mr. Juſtice *Willes* pronounced the ſentence for burning him in the hand, which was executed in the face of the court, and he was then diſcharged.

REX *verſus* PHILLIPS.

REES *verſus* ABBOTT.

Tueſday, June 30th.

THIS was a writ of error from the *Common Pleas*, in an action upon a promiſſory note made by *two*, and the action brought againſt the defendant, the now plaintiff in error, *only*, who let judgment below go by default. The declaration ſtated, that the now plaintiff in error and another, made their promiſſory note, by which they *jointly or ſeverally* promiſed to pay.

Declaration that the defendant and another made their promiſſory note, by which they *jointly* or *ſeverally promiſed* to pay, is good.

Mr. *Wood*, for the plaintiff in error, objected, that it was not ſufficiently charged that he had made any promiſe to pay the note in queſtion; and cited *Butler* v. *Maliſſey*, 1 *Str.* 76. and *Ovington* v. *Neale*, 2 *Str.* 819. as expreſsly in point.

Lord MANSFIELD.—If *or* is to be underſtood in this caſe as a *diſjunctive*, who is to *elect*, whether the note ſhall be *joint* or *ſeveral?* Certainly the perſon to whom it is payable. If ſo, the plaintiff has made his election. But *or*, in this caſe, is *ſynonimous* to *and*. They both promiſe that *they*, or *one* of them, ſhall pay: Then *both* and *each* is liable *in ſolidum*. The nature of the tranſaction forces this conſtruction. It is ſaid that Judges ſhould be *aſtute* in furtherance of right, and the means of recovering it. And therefore one is aſhamed to ſee either hitch or hang upon pins or particles, contrary to the true manifeſt meaning of the contract.

BULLER, Juſtice.—If the note had been a joint note only, not a joint and ſeparate note, the defendant could only have pleaded in abatement. It would not have been error.

Per Cur. Judgment affirmed.

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DOE, *ex dim.* HANSON, *verſus* FYLDES.

Tueſday, June 30th.

One deviſes a meſſuage and lands to her eldeſt daughter *A* and the *heirs of her body for ever*; and for want of ſuch iſſue to her daughter *B.* and the *heirs of her body, for ever*, and ſo on to her *third* and *fourth* daughter in *tail*, CHARGED nevertheleſs with 180*l.* to be *levied* out of the firſt annual profits, and to be divided equally amongſt the three younger daughters: And that the executors ſhould ſtand *ſeiſed* of the ſaid meſſuage and lands for *ſo long time* as they or their aſſigns ſhould have *raiſed* the ſaid ſum, or, *ſo long as until* the ſame ſhould be *paid* by the ſaid *A.* or *her heirs*; and immediately after the raiſing, or other payment of the ſaid ſum by *A.* or her heirs, then that *A.* and her heirs ſhould enjoy the ſaid meſſuage, &c. *for ever*; allowing the three younger daughters and a couſin, the uſe of the kitchen and the rooms over till they married. Held, that *A.* took only an *eſtate tail.*

UPON a rule to ſhew cauſe why a new trial ſhould not be granted, the caſe appeared to be as follows: This was an ejectment, brought for an ancient meſſuage and tenement and certain lands in *Preſtwicke*, in the county of *Lancaſter*, which formerly belonged to the widow *Scolefield*, who had four daughters. At the trial before Mr. Juſtice *Gould*, at the *Lent* aſſiſes at *Lancaſter*, 1778, it appeared that the widow *Scolefield* died a year *before* the ſtatute of frauds and perjuries was made; and by her will, bearing date the 20th of *June* 1676, after reciting that ſhe was ſeiſed in fee of the premiſes in queſtion, ſhe deviſed them in the following words: "It is my will and mind, "and I do hereby give, bequeath, grant, alien, releaſe, and con- "firm, all and every part of the ſaid meſſuage, tenement, and "all and every the lands, &c. thereunto belonging, unto my el- "deſt daughter, *Alice Scolefield*, and the *heirs of her body* lawfully "to be begotten *for ever*: And for *want of ſuch iſſue*, then to my "daughter *Anne Scolefield*, and the *heirs of her body* lawfully to be "begotten *for ever*: And for *want of ſuch iſſue*, then to my third "daughter *Margaret Scolefield*, and the *heirs of her body for ever*: "And for want of ſuch iſſue, then to my youngeſt daughter, "*Judith*, and the *heirs of her body for ever*; and for *want of ſuch* "*iſſue*, then to the *right heirs* of me the ſaid *Alice Scolefield*, for "ever; *charged* and chargeable, notwithſtanding, with the full "ſum of *nine ſcore pounds*, to be levied and raiſed out of the *firſt* "clear annual and *yearly iſſues and profits* of all and every the ſaid "meſſuage, tenement, lands, and premiſes aforeſaid, and after "my deceaſe to be equally diſtributed amongſt my three young- "eſt daughters, *Anne*, *Margaret*, and *Judith*, as the ſame ſhall "be ſo raiſed, &c. for and towards their maintenance and better "preferment. And it is my will and mind, that my executors, "hereinafter mentioned, ſhall and may ſtand and be ſeiſed, poſ- "ſeſſed, and intereſted of, and in, all and every the ſaid meſ- "ſuage, lands, tenements, &c. with their appurtenances, from "and immediately after my deceaſe, for ſo long a time as until "they or their aſſigns ſhall, may, or lawfully might have fully "*raiſed*, received, and taken up the aforeſaid ſum of *nine ſcore* "*pounds*, over and above all coſts and charges, as the ſame ſhall

"be

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" be so raised, to and for the benefit of my said daughters *Anne*, " *M.* and *J.* equally, or so long as until the same shall or may " be *paid* and discharged by my *eldest daughter*, *Alice Scolefield* or " *her heirs*: and *from and after* the *raising* and receiving or *other* " *payment* of the said sum of nine score pounds by my daughter " *Alice Scolefield* or *her heirs*, it is my will and mind, that she and " *her heirs* shall have, hold, and enjoy the said messuage, *&c. for* " *ever*: only allowing my three youngest daughters, *Anne*, *M.* " and *J.* and my cousin *Edmund Scholes*, the kitchen and the " rooms over belonging to it, to have and dwell in, until they " shall happen to be married, and no longer." The ejectment was brought by the lessor of the plaintiff, as heir of the body of *Alice Scolefield*, the eldest daughter, against the defendant, who was a purchasor or creditor of *Alice Scolefield*. At the trial, the defendant insisted, that under this will, *Alice* took a fee. It was admitted, that the nine score pounds were paid between the death of the testatrix and the year 1688; and in order to shew that the intention of the will was to give *Alice* a fee, the defendant *offered evidence*, that in the year 1676, the testatrix, having then an estate *for three lives* in the premises, purchased the *reversion* for 120*l.* That an estate for three lives is considered as of equal value with the reversion of such estate; and therefore, the full value of the whole was, at that time, about 240*l.* The inference intended to be drawn from this was, that after payment and distribution of the 180*l.* amongst the three younger daughters, there would remain only the value of 60*l.* for the eldest. Therefore, supposing her to take a fee, she would have no more than her sisters; but each would take an equal interest. On the other hand, as the *annual value* was but 17*l.* it was impossible the testatrix could intend the eldest to be so long without any benefit at all, as she necessarily must be, before the rents and profits would amount to the sum of 180*l.* This evidence was rejected by Mr. Justice *Gould*, and a verdict was found for the plaintiff, subject to the opinion of the court upon a motion for a new trial, without costs, on the whole of the case.

This case was spoken to last term, by Mr. *Mansfield*, Serjeant *Walker*, Mr. *Lee*, and Mr. *Bolton*, for the plaintiff; and by Mr. *Wallace*, Mr. *Dunning*, Mr. *Davenport*, and Mr. *Wilson*, for the defendant. The court took time to consider; and on the last day of the term Lord *Mansfield* said, that both points of the case required great attention; therefore ordered it to stand in the paper for argument this Term.

It

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It was now argued by Mr. *Lee* for the plaintiff, and Mr. *Wilſon* for the defendant. The ſubſtance of the arguments was as follows:

Mr. *Lee*, after ſtating the will, ſaid, The two queſtions are, firſt, Whether *Alice Scolefield* took an *eſtate tail* or an eſtate *in fee*, conſidering the whole of the will together, without regard to any foreign *extrinſic* circumſtances? *Secondly*, Whether the court is at liberty to regard ſuch *extrinſic circumſtances*, as were offered to be proved at the trial, reſpecting the will. As to the firſt point, he contended, that *Alice Scolefield* took an *eſtate tail*. The teſtatrix, after ſtating herſelf to be ſeiſed in fee-ſimple, deviſes to *Alice Scolefield* expreſsly in tail. So far it is clearly an eſtate tail. Then comes the charge of nine ſcore pounds for the younger daughters, and that the executors ſhall be ſeiſed till the ſaid ſum ſhall be raiſed or paid. Then that *Alice Scolefield* and her heirs ſhall enjoy, and that ſhe and her heirs ſhall permit the ſiſters to have the uſe of ſome particular rooms.—It is a general rule, that when land is given, charged with money to be paid out of the *annual profits*, *that* is not a reaſon for conſtruing the deviſe to extend further than the words expreſs. For *Collier*'s caſe, 6 *Co.* 16. *a.* reported alſo in *Cro. Eliz.* 378. ſhews, that the only reaſon for extending the conſtruction is, becauſe otherwiſe the deviſee may loſe by the deviſe; and that can only happen where a *groſs ſum* is to be *previouſly* paid. *Freak* v. *Lea*, 2 *Lev.* 249. *Pollexf.* 553. S. P. Even the charge of a groſs ſum, not payable merely out of the rents and profits, will not make it a fee, if a contrary intention appears. *Bacon v. Hill*, *Cro. Eliz.* 497. But here is no charge of a groſs ſum, ſo as to make it doubtful whether the deviſee might be a loſer: for this is to be paid out of the *firſt rents and profits*.—The word "heirs" in the latter part of the will plainly is meant to give to all her children ſucceſſively, to charge the land with a ſum of money for the younger, that they all, as executors, ſhould hold till the money ſhould be paid, and then, that the eldeſt ſhould take, in the manner preſcribed in the beginning of the will. In *Webb* v. *Herring*, 2 *Cro.* 415. the word "heirs" was conſtrued to mean "heirs of the body" (which had been mentioned before in the will); the limitation over being to the teſtator's heir at law. *Tyte* v. *Willis*, *Forreſt. Rep.* 1. S. P.—It is a certain and invariable rule, that a will muſt be conſtrued in ſuch a manner as that every part of it may ſtand; but if the latter part of this will ſhould be conſtrued to give a fee-ſimple, it would entirely overturn the former part; though it does not appear that any new circumſtances occurred to the mind of the teſtatrix. Therefore, *Alice* took *only* an *eſtate tail*.

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As to the point of evidence, he insisted, that the court could not go into the circumstances of the family in order to make an equal division, nor receive extrinsic evidence. He again mentioned *Collier*'s case, where it is said, "that the value is immaterial;" and *Wellock* v. *Hammond*, *Cro. El.* 204. to the same effect. He also relied much on Lord *Cheney*'s case, 5 *Co.* 68. for the general principle, "that the construction of wills ought to "be collected out of the words of the will in writing, and not "by any averment out of it." If circumstances out of the will are to have any weight, it will never be certainly known by the parties interested, by counsel advising them, or by purchasers, what title can be maintained under it. The case of *Cole* v. *Rawlinson*, 1 *Salk.* 234. shews, that Lord *Holt*'s opinion was, that the intent of the testator was to be collected from the words of the will, not from extrinsic circumstances. To this point also, is the case of *Brown* v. *Selwyn*, on appeal, in the House of Lords, from a decree of Lord *Talbot*.

This evidence was offered to shew, that the division of her property by the testatrix would be more equal, if this devise were to be construed a fee. But it is nothing to the court, whether the division is equal or unequal, prudent or imprudent; it is only material to them, what appears to them to have been the will of the testatrix, not what it ought to have been. Lord *Bacon*'s distinction between *ambiguitas latens*, and *ambiguitas patens*, is a right distinction, and ought to be adhered to. As to the case of *Oates ex dim. Wigfall* v. *Brydone* and others, 3 *Burr.* 1,895. there, it only appears that the value was unnecessarily found. Upon these grounds, he prayed the rule might be discharged.

Mr. *Wilson*, for the new trial, began with the point of evidence; for, he said, if that could be once established in his favour, it would manifestly appear that the testatrix meant to give *Alice Scolefield* an estate in *fee*. He laid it down as a general rule, that where it appears that a testator had any particular thing or circumstance in contemplation, the court may inform themselves of that circumstance, in order to be as fully acquainted with it as the testator was. Now where a testator charges his estate with the payment of *money*, he has always the value in *contemplation*: Therefore, in this case, the land being charged, its value ought to be enquired into: In *Collier*'s case it is said, "That where the land is only of the value of three "or four pounds a year, and 20 *s.* or 30 *s.* only are charged upon "it, there the devise is construed to be for life:" which shews

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that the value may be enquired into; and that in a doubtful caſe, it may depend on the value. To this effect are *Kerman* verſus *Johnſon*, *Stiles* 281 & 293: and alſo *Ivy* v. *Gilbert*, 2 *P. Wms.* 13. *Prec. in Chanc.* 523. S. C.—In Lord *Cheney*'s caſe, though ſome ſuch doctrine might have fallen from the court, as Mr. *Le* mentions, yet the main queſtion was different from this. In ſuch a caſe as the preſent, there can be no danger in admitting parole evidence; becauſe the value of an eſtate is a thing notorious, and any impoſition in that reſpect might be eaſily detected. Lord *Holt*, in *Cole* v. *Rawlinſon*, lays down the rule of evidence too largely; beſides his opinion was extrajudicially given, and the other three Judges diſſented from it. Parole evidence may be given to rebut an equity.

Here the court aſked Mr. *Wilſon*, What uſe he meant to make of this evidence?

Anſwer, To ſhew the eſtate was ſo ſmall, that if it was meant to be given in tail only, the eldeſt daughter might loſe her proviſion: For if ſhe does not pay nine ſcore pounds immediately, ſhe muſt wait till it is paid out of the profits, which would have taken many years. The executors could not have raiſed the ſum by mortgage, as the only means preſcribed are out of the firſt clear annual profits. The teſtatrix at firſt intended to give an eſtate tail to all her children ſucceſſively; then ſhe ſeems to have conſidered that the younger were to come in for their legacies of money immediately; and therefore to have meant to give the land to the eldeſt in fee. The latter deviſe, (conſidered in itſelf), is clearly a deviſe in fee. The rule, that where a doubt ariſes on any part of a will, it muſt be conſtrued ſo that every part may ſtand, is right, where it applies: But here is no doubt on the meaning of either clauſe; the difficulty lies in the latter clauſe being inconſiſtent with the former. The caſes cited on the other ſide, where the word "heirs" had been conſtrued to mean heirs in *tail*, (they having been mentioned before,) were ſo determined becauſe it appeared in thoſe caſes that the teſtator did not know the legal diſtinction between the word "heirs," and the words "heirs of the body;" but in this caſe it manifeſtly appears that the teſtatrix knew that diſtinction; and, therefore, if ſhe had meant in the latter clauſe to give an eſtate tail, ſhe would have uſed the words, "heirs of "the body" again.

Mr. *Lee* in reply.—The doctrine laid down in ſupport of the rule, tends to ſubvert every eſtabliſhed rule in the conſtruction

of wills. The principle which diſtinguiſhes between a charge of money to be paid out of the rents and profits, and a groſs ſum to be paid generally, is thoroughly ſettled; though now attempted to be overturned. 1778. DOE *verſus* FYLDES.

Lord MANSFIELD.—All the caſes, in which the implication ariſing from the condition of paying money, is admitted, are caſes where the queſtion was, Whether the deviſees took an eſtate for *life* or in *fee*? and not whether they took an eſtate in *tail*, or in *fee*.

Mr. LEE.—As to the argument attempted to be drawn from the teſtatrix uſing the words, "heirs of the body," in the former part of the will, and not in the latter; it is an inference equally juſt, to ſuppoſe that as ſhe firſt ſtates herſelf to be ſeiſed in fee ſimple of the lands, and does not uſe ſimilar expreſſions in the latter clauſe in queſtion, ſhe could not mean by that clauſe to give an eſtate in fee; if her ſuppoſed knowledge of the technical expreſſions is to be argued from at all.

Cur. adviſare vult.

On this day Lord *Mansfield*, after ſtating the caſe, delivered the opinion of the court as follows: A motion for a new trial has been made upon two grounds: Firſt, That upon the true conſtruction of the words of this will, *Alice Scolefield* took an eſtate in fee ſimple, and not an eſtate tail only, as contended on the part of the leſſor of the plaintiff. Secondly, That ſuppoſing, on the face of the will, the latter to be the true conſtruction, yet, if the defendant were let in to prove the value of the eſtate at the time of the deviſe, ſuch proof would vary the conſtruction, and therefore, that ſuch extrinſic evidence ought to have been admitted at the trial.

As to the *firſt*, it is plain that the teſtatrix, at the time of making her will, had legal aſſiſtance; but it was ſuch aſſiſtance as ſerved only to confound, by making her uſe all the *dragnet* words of conveyancing, without knowing the force of them. For ſhe intermixes all the words that belong to grants and deeds. After the preamble to her will, ſhe deviſes thus:—Here his Lordſhip ſtated the will, and proceeded as follows: Now the ſingle queſtion upon the conſtruction of this will is, "Whether "the words, '*heirs of Alice Scolefield*,' *thrice* repeated relative to "to the redemption of the term veſted in the executors, ſhall be "conſtrued to refer to the ſpecial deſignation of the heirs, to "whom the eſtate is deviſed in the *beginning of the will*; or to "introduce a *new* and more *general denomination of heirs*, and to

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" amount to a revocation of the expreſs eſtate tail, given in the " beginning of the will, with all the remainders over to the three " ſiſters, and the reverſion in fee to the teſtatrix and her right " heirs?" It is manifeſt that the firſt deviſe is an expreſs eſtate tail to each of the four daughters ſucceſſively, and that the teſtatrix meant to charge the firſt eſtate tail to her eldeſt daughter, with the ſum of 180 *l.* for the *immediate* benefit of her other three daughters: For the deviſe is in theſe words, " charged and " chargeable notwithſtanding, *&c.*" In the ſame clauſe ſhe particularly expreſſes her intention, that this ſum ſhould come out of the *poſſeſſion*, and not out of the *inheritance:* Becauſe it is to be raiſed *out of the firſt and clear yearly and annual profits.* To effectuate this intention, ſhe is adviſed to create a term in her executors to receive the rents and profits *quouſque.* So that there are in the cleareſt words ſucceſſive eſtates tail, ſubject to this charge; or, if I may uſe the expreſſion, this ſum of 180 *l.* is to be raiſed *previous* to any of the eſtates tail. If the matter had reſted there without any other words in the will at all, *Alice*, or the heirs of her body, would have had a right to redeem the term veſted in the executors; for it was an incumbrance prior to their taking poſſeſſion under the eſtate tail. Of courſe, if they raiſed the money, they would have a right to have the term ſurrendered or aſſigned. The teſtatrix, when ſhe mentions this payment, makes no *new* deviſe, but only ſuppoſes it a thing that may happen: For ſhe ſays, " That her executors ſhall ſtand poſ- " ſeſſed, that is, receive the rents and profits till they or their " aſſigns ſhall have raiſed this ſum; or for ſo long time as till " *Alice Scolefield* and *her heirs* ſhall have diſcharged the ſame; " after which payment, ſhe and her heirs ſhall enjoy the ſaid meſ- " ſuage, *&c.* for ever." What is to be paid or diſcharged? A ſum of money to the three younger ſiſters. Who is to be hurt if it is not paid? *Alice Scolefield* and the heirs of her body. Who was to pay? *Alice* and the heirs of her body: And it is to be paid to thoſe who would be her heirs if ſhe had no iſſue. The word " *heirs*," therefore, in this part of the will, is uſed in contradiſtinction to the ſiſters. If the word " heirs" is ſo uſed in the firſt place, it muſt be ſo uſed in the ſeveral other places that follow. Nothing is to be implied from the additional words " *for ever*;" becauſe that expreſſion is repeated by the teſtatrix in the deviſe of each of the eſtates tail. The nature of the proviſion affords a ſtrong argument, that ſhe did not mean to change the ſenſe of the word " heirs" in this part

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of the will, and to give a *fee ſimple*. Becauſe it would be abſurd and nonſenſical to make a diſtinction between raiſing money by rents and profits, or by mortgage or ſale, or charge on the inheritance, where the firſt taker has *a fee ſimple*: What does it ſignify how it is raiſed? But where the *poſſeſſion* and the *inheritance* are *different*, a direction to raiſe a ſum of money out of the rents and profits, is a burthen thrown upon the poſſeſſion in favour of the inheritance. As where an eſtate is given to *A.* for life, remainder to *B.* in tail, and a charge is made upon the rents and profits, there the eſtate of tenant for life goes in eaſe of the inheritance. The teſtatrix here might not think of a common recovery. She appears to have meant that her family eſtate, which was but a ſmall one, ſhould go to her family clear and unincumbered. What knowledge ſhe had, which induced her to think that *Alice* could diſcharge this ſum of 180*l.* is not apparent, nor is it material: Her object certainly was to have the eſtate free from it. This ſeems to us to be the true conſtruction of the will *upon the face of it*.—But at the trial, *extrinſic evidence* was offered to ſhew, "That the eſtate in queſtion, at the "time of the deviſe was worth but 240*l.*; and if ſo, ſuppoſing "the eſtate to be ſold, each daughter would have an equal ſhare "(60*l.*); and from thence it is inferred, the teſtatrix meant by the "ſubſequent deviſe to give a fee ſimple to the eldeſt daughter." There is no occaſion in this caſe to go into the particular exceptions out of the general rule, "That a will ſhall be conſtrued "by what appears upon the face of it, and *not* upon *circumſtances* "or matter extrinſic;" becauſe the extrinſic matter here proves nothing at all. It lays indeed a circumſtance before the court which might have its weight, if the court were called upon to make a will for the teſtatrix. But *that* the court cannot do. If *ſhe* has not made the ſhares equal, the court cannot ſay they ſhall be ſo. Who knows what proviſion the eldeſt daughter had from her father before? Or who can ſay ſhe had none? It is plain the *teſtatrix did not mean* that all the daughters ſhould take *equally*; if ſhe did, ſhe would either have made no will *at all*; or have directed the eſtate to be ſold and divided equally amongſt them. But ſhe has made an *unequal* proviſion; for ſhe has given 10*l.* more to her daughter *Judith* than to the reſt; and ſhe gives the youngeſt daughters the nine ſcore pounds intended for them immediately, and the eldeſt nothing till they are paid. The evidence offered at the trial therefore, does not lay a foundation to imply that *Alice* was to take a fee. It is not in the leaſt like the

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caſes where the court has inferred a neceſſary implication of an eſtate in fee, from a deviſe of lands without any words of limitation, where the lands are charged with a groſs ſum. The doctrine in thoſe caſes begun when the modification of uſes was by way of condition; and charging a deviſee with the payment of a groſs ſum was looked upon as a condition, the non-performance of which amounted to a forfeiture of the eſtate: The direction was to pay a ſum of money by way of condition, and the heir entered for the condition broken. Where the teſtator uſes no words of limitation; there the rule of law in the caſe of grants and deeds, that without words of limitation it ſhall be for life and for life only, takes place. But as in caſe of a will, the manifeſt intent of the teſtator is deciſive, and need not be expreſſed in any formal words, the certainty that the teſtator muſt mean a bounty and benefit to his deviſee, is ſufficient to ſupply the want of a formal limitation. But there never was an inſtance of ſuch an implication, where an expreſs eſtate for life, or an expreſs eſtate tail is given in terms; and here, it is an eſtate tail with ſeveral remainders over. We are therefore unanimouſly of opinion, that the eldeſt daughter took only an eſtate tail, and that the evidence offered at the trial was totally nugatory and irrelevant.—The conſequence is, that the rule for a new trial muſt be diſcharged.

Friday, July 3d.

VICARS *verſus* HAYDON, Leſſee of CARROL, in Error.

After judgment in ejectment from *Ireland affirmed*, this court amended the declaration by enlarging the term, tho' the record was remitted to *Ireland*.—A writ of *ſuperſedeas* was iſſued to the former *mittimus*, and a new writ of *mittimus* was awarded to the Judges of *B. R.* in *Ireland*, enclosing the tenor of the record ſo amended. The whole upon payment of coſts by the party applying.

IN *Michaelmas* Term 1762, *Carrol*, in the name of *Haydon* his leſſee, brought an ejectment in *B. R.* in *Ireland* for lands there, and laid the demiſe to be for 15 years from the 25th of *November* 1762. In the ſame Term, an injunction was granted by the court of *Exchequer* in *Ireland*, at the inſtance of *Vicars*. On application to the court, *Carrol* was permitted at the *Summer* Aſſizes in 1768, to try the ejectment, execution being ſtaid till further order; and the plaintiff had a verdict. A new trial was moved for and refuſed: Whereupon *Vicars* brought a writ of error in this court; and the judgment below was affirmed. *Carrol* proceeding to get poſſeſſion of the premiſes, notwithſtanding execution

had

had been ſtayed by order of the court of *Exchequer* in *Ireland*, was, in 1769 prevented from ſo doing, by further injunction; and dying in 1770, the injunction bill was revived againſt his repreſentatives. In *Michaelmas* Term 1777, the cauſe in the court of *Exchequer* in *Ireland* was heard, and *Vicars*'s bill diſmiſſed: But *thirteen* days before the diſmiſſion of the bill, the *term* in the ejectment *expired*. In *Eaſter* Term 1778, which was after the writ of error brought, and before the record was remitted, an application was made to the court of *King's Bench* in *Ireland*, to amend the record by enlarging the term; which was refuſed, becauſe the record of the judgment was here; and the court there ſaid, "they never amended after "a writ of error was brought, and the record ſent over to *Eng-* "*land*. But the application to amend muſt be made here." 1778. VICARS *verſus* HAYDON.

The record was afterwards remitted to *Ireland*. It was then moved in this court by Serjeant *Walker* to amend the record, by enlarging the term in the declaration from *fifteen* to *twenty years*.

Mr. *Dunning* and Mr. *Lane* now ſhewed cauſe, and objected. 1. That as the record was ſent back to *Ireland*, *this* court could not amend. Pending an ejectment the court may enlarge the term; but here the cauſe is determined. Therefore it cannot be done but by conſent: And cited 1 *Salk.* 257. as in point. They alſo took a diſtinction between a motion to enlarge a term *before* it is expired, and *after*, which was the caſe here. For *that* is more properly making a *new term*.

Mr. *Solicitor General*, and Serjeant *Walker*, *contra*, in ſupport of the rule cited *Doe* verſus *Pilkington*, *Eaſt.* 9 *Geo.* 3. 4 *Burr.* 2,447. where the demiſe was laid *before* an entry made to avoid a fine, inſtead of being laid *after* the entry, and it was too late to make a new entry: And the declaration was amended. *Oates* v. *Shepherd*, 2 *Str.* 1,272, where the term was altered without conſent from five years to ten years: And *Roe* verſus *Ellis*, *Eaſt.* 14 *Geo.* 3. *C. B.* where the declaration counted of a term expired twelve years before the action brought, and was amended by the writ*.

Lord MANSFIELD.—You have not touched upon the only doubt I have, which is, Whether, being a record from *Ireland*, this court can amend it? For though the record is fictitiouſly here, it is not ſo in fact.

* *Vide* this caſe ſince reported, 2 *Black. Rep.* 904.

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To this it was anſwered, that in *Bac. Abr.* tit. *Error*, 203. it is ſaid, "that when the tranſcript is come ſafe from *Ireland* and "entered on the rolls of this court, it is a perfect record here." That in *Yelv.* 118. a precedent was ſhewn of a record removed from *Ireland*, remaining here. And they cited *Meredith*'s caſe, 1 *Ventr.* 217. where a judgment given in *Ireland* was amended by this court.

Lord MANSFIELD.—The ſingle doubt is upon the *form*. For the record is gone back to the court of *King's Bench*, in *Ireland*, and the whole of it is ſuppoſed to be ſent there. Therefore *they* muſt iſſue the ſubſequent proceſs. Upon a writ of error to the Houſe of Lords from this court, a *tranſcript* only goes up: And the record is ſuppoſed to be ſent back again hither; and if the judgment is affirmed this court muſt ſue out execution. On a writ of error from the *Common Pleas* though a tranſcript only is removed, this court may award execution. Upon a writ of error from *Ireland*, in judgment of law the record is removed here; but in fact a tranſcript only comes over; and when the judgment is affirmed, it is ſent back. In the caſe of the bill of exceptions*, I had occaſion to enquire particularly into the form, and had ſeveral letters from Lord *Annaly* upon the ſubject. And it is as I have ſtated. When the judgment is affirmed, a mandatory writ iſſues from hence to the *B. R.* in *Ireland*, reciting the whole record and proceedings, and commanding them to do execution, by which the cauſe is reſtored to that court. In the caſe of Sir *Thomas Broughton* †, which went from this houſe to the Houſe of Lords, after the Houſe had affirmed the judgment, it was ſuppoſed a miſtake had been committed by the Houſe, and it was wiſhed to be enquired into; but the record was come back to this court.—If the court can do what is aſked in this caſe, it ought to be done: It is mere matter of form. We will conſider of it.

The next day Lord *Mansfield* ſaid, The court had looked into the caſes, and that the proper mode of relief was according

* Symmers *et al. verſus* Regem, *ſupra*, 489.

† The name of this caſe was *St. John* v. *Biſhop of Winton*. Mr. Juſtice *Blackſtone* in his report of this caſe, vol. 2. 933, ſays, "A day or two after "the judgment was affirmed, a motion was made in the Houſe of Lords to re- "hear the cauſe, it being alleged that the majority of the Lords preſent were clear- "ly for reverſing the judgment, though by ſurpriſe they did not divide the Houſe. "But the fact being not clearly aſcertained, and alſo for the danger of ſuch a "precedent, the motion was withdrawn by conſent."

to

to the following rule, which his Lordſhip pronounced; "That "upon payment of the coſts of this application to the plaintiff "in error (to be taxed by the Maſter) the defendant in error be at "liberty to amend the record in this cauſe, by ſtriking out the "word "*fifteen*" in the declaration, and inſerting, inſtead there-"of, the word "*twenty*." And that a *ſuperſedeas* iſſue, at the "expence of the defendant in error, to the writ of *mittimus* here-"tofore ſent to the Judges of the court of *King's Bench* in *Ire-"land*; and that another writ of *mittimus* iſſue, at the expence "of the defendant in error, to the Judges of the ſaid court, "enclоſing the tenor of the record ſo amended."

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N. B. The *ſuperſedeas* was general, *quia improvidè emanavit*, without aſſigning any reaſons.

GOSLING *verſus* Lord WEYMOUTH.

Saturday, July 4th.

Peers may be ſued in *B. R.* by original bill.

IN debt upon bond by bill the defendant pleaded to the juriſdiction of the court, becauſe a Peer of the realm can only be ſued by original writ, and not by bill.—Demurrer and joinder in demurrer.

Mr. *Davenport* in ſupport of the demurrer inſiſted that by the ſtat. 12 & 13 *Wm.* 3. *c.* 3. in caſe of diſſolution or prorogation of parliament, or in caſe of adjournment for more than *fourteen* days, the ſame proceſs was given againſt Peers as againſt other perſons; and cited *Say* v. *Lord Byron*, *Sayer's* Reports 63.

Mr. *Wood contra*, for the defendant, in ſupport of the plea contended, that the object of the ſtat. 12 & 13 *Wm.* 3. *c.* 3. was not to introduce any new proceſs againſt the Peers of the realm, or to extend the juriſdiction of the court, as againſt them, further than it went before. That where Peers were meant to be included, they were named in the ſtatute; therefore where not named, they were not meant to be included. That the *ſecond ſection*, which gives the original bill againſt perſons entitled to privilege, ſpeaks only of *knights*, *burgeſſes*, *citizens* and *others*, having privilege. Therefore it could not extend to perſons of higher rank.—He entered into the hiſtory of the act, and ſaid, ſeveral amendments were made by the Lords, and particularly that they ſtruck out that part which related to the alteration of the *proceſs* as againſt them *; and that, as the act now ſtands, Peers could only be proceeded againſt during the times

* *Vide* Journals of the Houſe of Commons, vol. 13. 567.

mentioned

1778.

GOSLING *verſus* Lord WEYMOUTH.

mentioned in the act, in the ſame manner, as out of time of privilege, *before* the act. He ſaid, he could not find that this court was entitled to proceed by bill before this ſtatute. That neither Lord *Coke*, nor Mr. Juſtice *Blackſtone*, took notice of any ſuch proceeding againſt Peers. And it was clear that before the ſtatute, members of the Houſe of Commons could not have been ſued by bill. It would be ſtrange therefore if Peers could.

Lord MANSFIELD.—The note I have of the caſe of *Say* v. *Lord Byron* is as follows: "*Mich.* 26 *Geo.* 2. *B. R.* Mr. *L. Robinſon* "moved (upon an affidavit that the plaintiff had ſued out two "writs of *diſtringas*, whereupon the ſheriff had levied 40 *s.* and "4 *d.* and that no bill was filed,) for a rule to ſhew cauſe, why the "ſaid two writs ſhould not be quaſhed, and the money levied "thereon be reſtored. He objected that a Peer ought not to be "ſued by bill, but by original writ: And that the ſtat. 12 & 13 "*Wm.* 3. *c.* 3. does not make any variation in the proceedings "againſt *Peers*, but reſpects, in this particular, *commoners* "*only*.—Mr. *Stowe* ſhewed cauſe, and the rule was enlarged.—"Upon ſhewing cauſe at a further day, the court declared that "there were many precedents of actions againſt Peers of parliament for many years before the ſtatute of *Wm.* 3. as certified "by the Maſter, and Mr. *Day* the clerk of the rules: And ſaid, "why could not the court ſupport its ancient juriſdiction, as "well as the court of *Exchequer* hold plea as *debitor domini regis*? "And the court in that caſe diſcharged the rule." This is an authority in point. The original bill was the common law proceſs.

Per Cur. Judgment *quòd defendens reſpondeat ouſter*.

Same day.

DOE *ex dim.* JUPP *verſus* ANDREWS.

If the defendant's attorney who is a ſubſcribing witneſs to an agreement upon which the plaintiff brings his ejectment, refuſe to give evidence of his attestation, &c. upon ſervice of a *ſubpœna* upon him in court for that purpoſe, the court out of which the record iſſues will grant an attachment againſt him.

THIS was an application for an attachment againſt *Johnſon* the attorney for the defendant in this cauſe, for a contempt, in refuſing to give evidence, upon being ſerved with a *ſubpœna* ticket in court at the trial. *Johnſon* was a ſubſcribing witneſs to an agreement, under which the ejectment was brought; and in conſequence of his refuſal to give evidence of his atteſtation, &c. the plaintiff was nonſuited. The reaſon he aſſigned was, that being the defendant's attorney, he

was not bound to give evidence to the prejudice of his client. On shewing cause against the attachment, an affidavit on the part of *Johnson* was read, stating, that seven tickets had before been annexed to this *subpœna*, whereas there ought to be only four persons' names to one *subpœna*, and that no oath was tendered to him. 1778. DOE *versus* ANDREWS.

Mr. *Morgan* and Mr. *Lade* shewed cause. Mr. *Dunning* in support of the rule.

Lord MANSFIELD.—I think the attorney's original misbehaviour is aggravated by his present defence. By attesting an instrument, a man pledges himself to give evidence of it, whenever he is called upon. Here, the attorney was present in court, and refuses from corrupt motives avowed by himself. That he was attorney to the other side, is no reason for breaking his engagement with the plaintiff. An attorney has no privilege to refuse to give evidence of collateral facts. I have known an attorney obliged to prove his client's having sworn and signed the answer upon which he was indicted for perjury. I think Mr. Serjeant *Sayer*, who tried the cause, would have been warranted in committing this man; but he has taken the more prudent method of leaving the matter to this court. As to any irregularity in the *subpœna*, none appears upon the affidavit: therefore, let the rule be made absolute.

N. B. Johnson then undertook to pay all the costs of the nonsuit, and of the application. Upon which the court ordered, that on payment of them, the rule should be discharged, otherwise, the attachment to issue.

THE END OF TRINITY TERM.

A

TABLE

OF THE

PRINCIPAL MATTERS.

A.

ABATEMENT.

1. IF the court has not a general juriſdiction of the ſubject matter, the defendant muſt plead to the juriſdiction, and cannot take advantage of it on the general iſſue. *Moſtyn* v. *Fabrigas.* *Page* 172
2. In every plea to the juriſdiction, another juriſdiction muſt be ſtated. *Ibid.* *Ibid.*

ACCEPTANCE. ACCEPTOR.

1. If the drawee of a bill of exchange, ſays, "he *cannot* accept it, *till ſtores* "*are paid for*," it is an undertaking to accept *when* the ſtores *are* paid for. *Pierſon* verſus *Dunlop.* 571. 4, 5
2. It is a rule amongſt merchants, that a *mere* engagement to the *drawer* of a bill, is *no* engagement to the *holder* of it; and therefore, not *of itſelf* an acceptance. *Ibid.* 572, 3
3. But if ſuch engagement be accompanied with ſuch circumſtances, as may induce a third perſon to take the bill by indorſement, it may amount to an acceptance. *Ibid.* 574
4. There may be a *conditional* as well as an abſolute acceptance. *Ibid.* *Ibid.*

Vide BILL of EXCHANGE, No. 1.

ACCEPTANCE of RENT.

Vide COVENANT, No. 7. RENT, No. 3, 4. LEASE, No. 1.

ACCOMPLICE.

1. In caſes not within the ſtatutes, an accomplice fully and fairly diſcloſing the guilt of himſelf and companions, and admitted a witneſs, and giving evidence, ought not to be proſecuted for that offence, nor *perhaps* for any other of the ſame kind *accidentally* omitted by him. By all the Judges in Mrs. *Rudd*'s caſe at the *Old-Bailey, Sept.* 1775. *Page* 339
2. But if proſecuted, he cannot plead this in bar, or avail himſelf of it on his trial; but may apply to the court to put off the trial, that he may apply for a pardon. *Ibid.*

Vide BAIL, No. 4, 5. PARDON, No. 1, 2.

ACT *of Bankruptcy.*

Vide BANKRUPT, No. 6. 11. 17. 18.

ACTION.

1. For *money had and received* does not lie againſt an exciſe officer to recover back an *over payment.* *Whitbread* v. *Brookſbank.* 69
2. If an action be brought againſt a *Judge of record* for an act done in his judicial capacity, he may *plead* that he did it as Judge of record, and *that* will be a ſufficient *juſtification*: and ſo may a *Judge* of a court in a *foreign country* under the dominion of the crown. *Moſtyn* v. *Fabrigas.* 172.

3. *All*

3. *All* actions of a *tranſitory* nature, that ariſe *abroad*, may be laid as happening in an *Engliſh county*. *Ibid.* *Page* 177

4. Action for *money had and received*, lies by the *true owner* of *money* or *notes*, againſt a *third* perſon, into whoſe hands they have come *malâ fide*; provided their *identity* can be traced and *aſcertained*. *Clarke* v. *Shee et al.* 197. 200

5. Action lies for goods ſold *abroad*, which are *prohibited* here, if the *delivery* of them be *complete abroad*; though the vendor may know, they are to be run into *England*. *Holman & al.* v. *Johnſon.* 341

6. *Secus*, if the *vendor* were to *deliver* the goods *in England*; or if they were only to be paid for, *in caſe* the vendee ſhould ſucceed in landing them. *Ibid.* 344, 5

7. *Actio perſonalis moritur cum perſonâ*, is a maxim not *generally*, much leſs *univerſally* true. *Hambly* v. *Trott.* 371

8. Diſtinction between *penal* actions and *criminal* actions. *Atcheſon* v. *Everitt.* 391

9. An action does not lie againſt an auctioneer for ſelling a horſe at the higheſt price bid for him, contrary to the owner's expreſs directions, not to let him go under a larger ſum named.—*Secus*, if the owner had directed the auctioneer to *ſet* the horſe *up* at ſuch a particular price and not lower. *Bexwell* v. *Chriſtie.* 395

10. Action for *money had and received* does not lie to recover back money paid for the *releaſe* of cattle diſtrained *damage feaſant*, though the *diſtreſs* were *wrongful*. *Lindon* v. *Hooper.* 414

11. But, in caſe of goods taken in *execution* and ſold under a warrant of diſtreſs, under a *conviction*; if the conviction is *quaſhed*, the owner may wave *the tort*, and bring an action for money had and received. *Feltham* v. *Terry*, cited in *Ibid.* 419.

12. So, where goods are taken in execution which are not the property of the perſons againſt whom execution is taken out; the owner may *waive* the *treſpaſs*, and bring his action for the amount of the money which the goods ſold for. *Ibid.* *Ibid.*

13. Where an action is brought in conſequence of a right liquidated by means of a ſtatute, the ſtatute is the only ground of action. *Rann* v *Green.* *Page* 476

14. An action *on the caſe*, is the proper remedy for a *fraud* upon the *toll* of a market. *Blakey* v. *Dinſdale.* 664, 5

15. Does *not* lie againſt the *Poſt-maſter general*, for the value of a bank note ſtolen by one of the *forters* of the poſt-office, out of a letter delivered into the office. *Whitfield* v. *Lord Le Deſpencer.* 754

Vide ASSUMPSIT.

ADJUDICATION.

1. Upon an act of parliament giving a ſpecial authority to ſeſſions for the compulſive diſpoſal of property, the adjudication of the ſeſſions muſt follow preciſely the proviſions of the act. *Rex* v. *Croke.* 30

ADMINISTRATION and ADMINISTRATOR.

A *creditor*, as well as the *next of kin*, has a right to ſue upon an adminiſtration bond, in the name of the Archbiſhop, or ordinary. *Archbiſhop of Canterbury* v. *Houſe.* 140

Vide EXECUTOR.

AFFIDAVIT.

It is not a ſufficient objection to an affidavit, that the party who makes it was convicted of perjury, unleſs ſuch conviction was followed by a judgment. *Lee* v. *Ganſel.* 3

Vide BAIL, No. 6. TROVER, No. 4.

AGENT.

1. Concerning the duty of an agent in inſuring, and what is or is not negligence in him. *Moore* v. *Mourgue.* 479

2. If money be miſpaid to an agent, and he has paid it over, he is not liable in an action by the perſon who miſpaid it. *Buller* v. *Harriſon.* 566

3. But if before he has paid the money to his principal, the perſon corrects the miſtake, the agent cannot afterwards pay it over without making himſelf liable. *Ibid.* *Ibid.*

4. And if there was no new credit, no acceptance of new bills, no freſh goods bought, or money advanced for his principal, the merely paſſing it in account is not a payment over. *Ibid.* *Page* 568

Vide ASSUMPSIT, No. 10, 11, 12. OWNERS and MASTER, No. 1, 2, 3.

AGREEMENT.

A. by agreement in writing *unſtamped*, articles with *B.* to grant him a leaſe for 21 years. *B.* has poſſeſſion 18 years, without any leaſe being demanded or tendered. This agreement is a good defence to an ejectment brought by *A.* *Weakly ex dim. Yea* v. *Bucknell.* 473

AMENDMENT.

1. Replication amended after verdict by inſerting the words "and the defendant does ſo likewiſe" at the end of the replication inſtead of "*&c.*" *Sayer* v. *Pocock.* 407.
2. Treſpaſs and falſe impriſonment againſt *two*; *one* only found guilty; writ of error in the name of both: The court amended it by ſtriking out the name of the defendant, for whom a verdict was given below. *Vereſt* and *Smith* v. *Raſael.* 425
3. After judgment in ejectment in *Ireland affirmed* in the court of *King's Bench* in *England*, the declaration was *amended* by *enlarging the term*, though the record had been *remitted* to the *King's Bench* in *Ireland*. The court iſſued a writ of *ſuperſedeas* to the former *mittimus*, and alſo a new writ of *mittimus* encloſing the tenor of the record ſo amended. The whole at the expence of the party applying. *Vicars* v. *Haydon.* 841. 844

ANNUITY.

A bond for the payment of an annuity for *a term of years* is within the ſtat. 7 *G.* 1. *c.* 31; though not given by the bankrupt for goods ſold, *&c.* in the courſe of his trade. *Pattiſon* v. *Bankes.* 540

Vide USURY, No. 5.

APPORTIONMENT.

Vide INSURANCE.

APPROVER.

The doctrine and mode of approvement. *Rex* v. *Rudd.* *Page* 335

ARREST.

1. A bailiff in execution of *meſne proceſs* may *break open* the door of a *lodger's apartment*, having firſt gained peaceable entrance at the outer door of the houſe. *Lee* v. *Gaſſel.* 1
2. Whether the court will diſcharge a perſon illegally arreſted, is matter of *diſcretion*, and ſeems to depend on the behaviour of the party applying. *Ibid.* 9
3. An arreſt muſt be by *authority* of the bailiff, but he need not be the *hand* that arreſts, nor *in ſight*, nor *within* any *preciſe diſtance* of the defendant; but he muſt be employed *upon that* buſineſs. *Blatch* v. *Archer.* 65
4. A bankrupt came from *Holland* with *intent* to ſurrender on the *forty-ſecond day*; but, hearing his time was *enlarged*, reſolved *not* to ſurrender till the enlarged day; in the mean time he was arreſted, and the court held he ſhould not be diſcharged: For till *actual* ſurrender, the ſtat. 5 *Geo.* 2. meant only to protect a bankrupt, whilſt he is *going* to make ſuch ſurrender. *Kenyon* v. *Solomon.* 156

Vide EVIDENCE, No. 3, 4, 5.

ARREST *of judgment.*

Vide JUDGMENT, No. 3, 4.

ASSAULT.

Vide DECLARATION, No. 3.

ASSETS.

Vide ASSUMPSIT, No. 4, 5. EXECUTOR, No. 2, 3, 4.

ASSIGNEES *of Bankrupts.*

1. In *aſſumpſit* againſt the vendee of goods ſold by the bankrupt *after* the commiſſion, they need not name themſelves aſſignees in the declaration. *Secus*, if on a contract made by a bank-

a bankrupt *before* the commiſſion. *Evans et al* v. *Mann.* *Page* 569

2. And if there was an actual treaty between them and the defendant, relative to the matter in litigation, it ſeems they need not prove the trading, bankruptcy, &c.; for the action is founded on an actual contract, and they may recover *ſuo jure*. *Ibid.* 570

Vide BANKRUPT, No. 12. PARTNERS, No. 1. 3.

ASSUMPSIT.

1. A promiſe by the defendant himſelf to pay debt and coſts awarded by a judgment, is no ground on which to raiſe an *aſſumpſit*, for it is turning a *judgment debt* into a *ſimple contract* debt. *Aliter*, if ſuch undertaking had been by a *third* perſon, in conſequence of ſuch forbearance. *Anonymous.* 128

2. A *parol* promiſe by *A.* to pay for goods ſold to *B.*, *if* B. *did not pay for them*, though made *before delivery* of the goods, is a *collateral* undertaking within the *ſtatute of frauds*. *Jones* v. *Cooper.* 227

3. *Secus*, if the defendant had ſaid, "deliver the goods and I will *ſee* "*them paid for.*" *Ibid.* 228, 9

4. *Aſſumpſit* lies upon a promiſe by an executor, to pay a legacy in *conſideration* of *aſſets*. *Atkins & Uxor* v. *Hill.* 284

5. Alſo S. P. determined in *Hawkes & Uxor* v. *Saunders.* 289

6. Where a man is under a *legal* or *equitable obligation* to pay, the law *implies* a promiſe. *A fortiori*, a legal or equitable *duty* is a ſufficient conſideration for an actual promiſe. *Ibid.* 290

7. So any *moral* obligation to pay is a ſufficient conſideration. *Ibid.* 294

8. If a rector give *A. B.* a certificate to the biſhop, and thereby appoint him curate of his church, promiſing to allow him a ſalary of ſo much, and to continue him in the office till otherwiſe provided of ſome eccleſiaſtical preferment, unleſs lawfully removed, for any fault; the curate, though diſcharged by the rector, may maintain *aſſumpſit* for his ſalary, not having been provided with any eccleſiaſtical preferment, or lawfully removed for any fault. *Martyn* v. *Hind.* *Page* 457

9. *A.* in conſideration of 1 *l.* 10 *s.* 7 *d.* received of *B.* undertakes in writing to be anſwerable for the due payment of *G. H*'s note to the order of the ſaid *B.* payable in five months. Afterwards, and before the note was due, *A.* became a bankrupt. *H.* did not pay the note when it became due. It was held that *A.*'s undertaking was *collateral* only; and therefore it reſted in *contingency* at the time of *A.*'s commiſſion. Conſequently it could not be proved under it. *Ex parte Adney.* 460

10. If money be paid by miſtake to an agent, and placed by him to the account of his principal, but *not paid over*, *aſſumpſit* for money had, &c. to the uſe of the perſon who has paid it, will lie againſt the agent. The mere *paſſing ſuch money in account*, or *making reſt*, without new credit given, freſh bills accepted, or further ſum advanced for the principal in conſequence of it, is not equivalent to a payment over. *Buller* v. *Harriſon.* 565

11. *Aſſumpſit* lies againſt the *owners* of a ſhip for *neceſſaries* furniſhed for it by *order* of the *maſter*, though the maſter be *leſſee* of the ſhip, for a term of years; under covenants, that he ſhall have the *ſole management*, and employ her for his own *ſole benefit*, &c. and that he ſhall repair her at his own ſole *coſt*; and though ſuch neceſſaries were furniſhed without the knowledge of the owners, or without their being known to the perſon who ſupplied them. *Rich* v. *Coe.* 636

12. But if the perſon ſupplying ſuch neceſſaries (No. 11) had *notice* of the contract between the owners and maſter, there might be ground to ſay, he meant to abſolve the owners. *Ibid.* 639

13. *Aſſumpſit* for *money had and received* will not lie to recover back *winnings* paid by the *lottery-office-keeper* or *inſurer* of lottery tickets, to the *inſured*, in conſequence of having inſured his tickets, contrary to the ſtatute. *Browning* v. *Morris.* 790

14. But ſuch action (No. 13.) will lie to recover the premiums of inſurance paid

paid by the *insured* to the lottery-office-keeper. *Browning* v. *Morris*. *P.* 791

15. *Assumpsit* for money had and received will not lie to recover an *exorbitant* demand. *Jestons* v. *Brooke*. 793

16. S. P. decided in *Plumbe* v. *Carter*, cited *Ibidem*. See also 116

17. In an action for *money had and received*, neither party is allowed to entrap the other in *form*. *Stevenson* v. *Mortimer*. 807

18. An action for *money had and received* is *not* a *proper* action to try a *warranty*. *Power* v. *Wells*. 818

Vide ACTION, No. 1, 4, 5, 6. 9, 10, 11, 12. AGENT, No. 2, 3. BANKRUPT, No. 16. OWNERS and MASTER, No. 1, 2, 3.

ASSURANCE. ASSURED. ASSURER.

Vide INSURANCE.

ATTACHMENT.

1. One in custody upon an attachment for non-payment of costs under stat. 5 & 6 *Wil.* & *Mar. c.* 11. § 13. may be discharged under the lords' act. 32 *Geo.* 2. *c.* 28. § 13. *Rex* v. *Stokes*. 136

2. An *attachment* for non-payment of costs, is in the nature of an *execution* in a *civil* suit. *Ibid.* 137

Vide ATTORNEY, No. 3. AWARD. CORPORATION, No. 6.

ATTORNEY.

If an attorney be *convicted* of *felony*, the court will *strike him off the roll*, though he has been burnt in the hand, and suffered imprisonment, pursuant to his sentence. Because he is an unfit person to practise as an attorney. *Ex parte Brounsall*. 829

2. An attorney is not *privileged* from giving evidence of *collateral* facts. *Doe* v. *Andrews*. 846

3. Therefore, where the defendant's attorney, who was a witness to an agreement upon which the plaintiff brought his ejectment, refused to give evidence of his attestation, *&c.* upon being served in court with a *subpœna* for that purpose, the court of *B. R.* out of which the record issued, granted an attachment against him. *Doe* v. *Andrews*. *Page* 846

4. He may be obliged to prove his *client's* having *sworn* and *signed* an *answer*, upon which the latter is *indicted* for *perjury*. *Ibid.* *Ibid.*

Vide PARTNERS, No. 5. WARRANT *of* ATTORNEY.

AVERMENT.

Vide LIBEL, No. 1. 5. PLEADING, No. 2.

AUTHORITY.

1. Where, by a statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, and must appear to be so upon the face of their proceedings. *Rex* v. *Croke*. 26

Vide NOTICE, No. 1, 2.

AWARD.

1. A motion to set aside an award, must be made before the *last* day of the next term after such award is published. Otherwise it is too late, and an *attachment* for non-performance of it may issue. *Freame* v. *Pinneger*. 23.

B.

BAIL.

1. WHERE the plaintiff might have had judgment against the original defendant, bail below are liable for the whole *debt* and costs. *Orton* v. *Vincent*. 71

2. A defendant who has been superseded for want of being charged in execution within two terms after judgment, *cannot* be held to *special bail* in an action brought upon such judgment; but he may be *charged in execution*, after judgment obtained in the *second* action. *Blandford* v. *Foote*. 72

3. A defendant, who has had judgment against him in an action for less than 10 *l.* cannot be held to *special bail* in a fresh action, either upon the judgment, or on a promise to pay the debt

debt and costs amounting to more than that sum. *Anonymous.* *Page* 128

4. An accomplice, who, in a case not within the statutes, is, under the practice allowed, admitted by the justices of peace as a witness, and is afterwards prosecuted, has only a claim to the mercy of the crown, founded on an express or implied promise of the magistrate, on a condition to be performed: And it depends on his conduct in fully and fairly disclosing the joint guilt of himself and his companions, whether the court will admit him to bail, that he may apply for a pardon. *Rex* v. *Rudd.* 331

5. Wherever an accomplice has a right to a pardon (which he may have, 1. by approvement; 2. by virtue of the statutes of 10 & 11 *Will.* 3. and stat. 5 *Ann. c.* 4.—and 3. by royal proclamation) the court will bail him that he may apply for it. So also they will, if he has only an *equitable* claim to a *recommendation* for mercy, gained by being admitted evidence for the crown under the *practice allowed.* 334

6. An affidavit in trover "that the defendants have possessed themselves "of divers goods belonging to the "plaintiff, and have refused to deliver them up; and that *they or* "*some of them* have converted them, "*&c.*" is sufficient to hold them to special bail. *Charter* v. *Jacques.* 529

7. If by the defendant's neglect the bail-bond becomes forfeited, the notice (to stay proceedings on the bail-bond) should be, that he will put in, and *perfect* bail on such a day. And in that case, the plaintiff may oppose the bail in court, without its being a *waiver* of the bail-bond. *Boldero* v. *Gray.* 769

8. It is a ground for rejecting a person as bail, that he is clerk to the defendant's attorney. *Bologne* v. *Vautrin.* 828.

Vide BANKRUPT, No. 30.

BANKRUPT.

1. A certificate discharges a bankrupt from a debt accruing *before* the commission, tho' judgment be not obtained till *after* the *certificate* allowed. *Bouteflower* v. *Coates.* 25

2. An *uncertificated* bankrupt may be a witness to *diminish*, but not to *increase* the fund: Therefore, in an action between a man unconnected with him (who was plaintiff) and a creditor of his (who was defendant) the bankrupt may be admitted to prove that the goods in question were delivered to *his* use and upon his credit only, and not to the use, or upon the credit of the defendant. *Butler* v. *Cooke.* *Page* 70

3. So in an action by assignees for money due to the bankrupt's estate, the bankrupt may be a witness for the defendant; but not for the assignees, unless he give a release, and has got his certificate. *Langdon et al.* v. *Walker*, cited *Ibid.*

4. A trader, in contemplation of absconding, incloses certain bills to *F.* a particular creditor, saying, he has the honour to shew him that preference, which he conceives is his due. This is done without the privity of *F.* and followed by an act of bankruptcy, before the notes could be delivered. The *essential motive* being to give a *preference*, and the act *incomplete*, it is *void*, though in favour of a very meritorious creditor. *Harman* v. *Fisher.* 117

5. But a payment made by a trader *in the ordinary course of dealing*, or *enforced* by legal process, though but the evening before his bankruptcy, is good. *Ibid.* 123

6. Though the act be complete, yet if the *sole* motive was to give a preference, it shall be void; and, if by *deed*, is in itself an act of bankruptcy. *Linton* v. *Bartlet.* *Ibid.* 124

7. But if the preference were only consequential, the case might be different: As if a payment were made, or an act done, in pursuance of a prior agreement. *Ibid.* 125

8. Though the judgment on which a bankrupt is in custody, be subsequent to the commission sued out, yet, if *the cause of action* arose before the bankruptcy, the bankrupt may be discharged by statute 12 *Geo.* 3. *c.* 47. *s.* 2. and interest and costs accrued since, are likewise discharged. *Blandford et al.* v. *Foote.* 138

9. The

9. The *enacting* part of *ſect.* 11. ſtat. 21 *Jac.* 1. *c.* 19. is *not reſtrained* by the *preamble*, but extends to goods of a third perſon, which he has permitted the bankrupt to be in *poſſeſſion of*, and to *ſell as his own*, as well as to the bankrupt's *original property*, kept and diſpoſed of by him as his own, after having conveyed it to a third perſon. *Mace* v. *Cadell.* *Page* 232

10. One who has traded *to England*, whether native, denizen, or alien, though never a reſident trader in *England*, but coming over here occaſionally, and committing an act of bankruptcy, is an object of the bankrupt laws. *Alexander* v. *Vaughan.* 398

11. A fraudulent judgment and execution, though void againſt creditors, is not in itſelf an act of bankruptcy. *Clavey et al.* v. *Hayley.* 427

12. One of three partners in a ſhip and cargo, the out-fit of which was 4,658 *l.* pays only 410 *l.* in part of his third ſhare and gives his notes for the re-remainder; but, before they become due, is a bankrupt. The other partners cannot, by voluntarily diſcharging the notes, ſtand in his place for the ſhare of the profits. But the aſſignees are entitled to a *full third*, both of the profits, and of the value of the ſhip. *Smith* aſſignees of *Hague* v. *De Silva.* 469

13. A ſurety of a bond who pays the debt *after* the bankruptcy of his principal, is not barred by the certificate; though the bond was forfeited *before* the bankruptcy. *Taylor* v. *Mills.* 525

14. A bond for an annuity for a term of years is within the ſtat. 7 *Geo.* 1. *c.* 31; and may therefore be proved under the commiſſion, as a debt payable at a future day; though not given in the courſe of trade. *Pattiſon* v. *Bankes.* 540

15. Stat. 7 *Geo.* 1. (above cited) extends to all *perſonal* ſecurities for a valuable conſideration, where the time of payment is *certain*, though *future*. *Ibid.* 543

16. A bankrupt may, in conſideration of a debt due *before* the bankruptcy, and for which the creditor agrees to accept no dividend, make ſuch creditor a ſatisfaction for the whole or in part, by a new undertaking; and *aſſumpſit* will lie upon ſuch undertaking. *Trueman* v. *Fenton.* *Page* 544

17. A *pretended ſale* to a creditor though of part only of a trader's goods, if *not in the courſe of trade*, but merely calculated to give a *fraudulent preference* and to defeat the equality of the bankrupt laws, is void; though the delivery of the goods to the creditor, and his aſſent to the tranſaction be compleat before the act of bankruptcy. But ſuch ſale is not in itſelf an act of bankruptcy, not being by deed. *Ruſt* v. *Cooper.* 629

18. No fraudulent tranſaction which is not a deed, is in itſelf an act of bankruptcy. *Ibid.* 633

19. But if a creditor be paid *in the courſe of buſineſs*, it is good, notwithſtanding the debtor's knowledge of his own affairs, or his intention to break: Becauſe ſuch preference is got *conſequentially, not* by *deſign*. *Ibid.* 634

20. So, where a creditor preſſes for payment, and the debtor makes a mortgage of goods, and delivers poſſeſſion. *Ibid.* *Ibid.*

21. A bond payable by inſtallments, given in conſideration that the obligee would marry and ſettle a ſmall eſtate upon a ſervant maid, and alſo maintain a baſtard of the obligor, is within the ſtat. 7 *Geo.* 1. *c.* 31. and may be proved under a commiſſion of bankrupt againſt the obligor. *Ex parte Cottrell.* 742

22. Merely *drawing* bills upon a perſon's *own account*, at the expence of paying a *quarter per cent. commiſſion*, beſides intereſt at 5 *l. per cent.* for their being diſcounted, and borrowing *accommodation* notes in lieu of his own to the ſame amount, will not make a man an *object* of the *bankrupt laws*. *Hankey* v. *Jones.* 745

23. Drawing and re-drawing may or may not amount to a trading in merchandize. It depends upon circumſtances. *Ibid.* 751

24. If a perſon in the country draw on his banker in *London*, for the purpoſe of diſcharging a particular debt; and direct his banker to re-draw upon him to the ſame amount; that alone is not a trading in merchandize. *Ibid.* *Ibid.*

25. But where two perſons who have large ſums of other people's money in their hands, are in a courſe of drawing and re-drawing upon each other for the amount of ſuch ſums, *that* is a trafficking in exchange. *Hankey* v. *Jones*. *Page* 751

26. As where *A.* and *B.* the one a military agent in *England*, and the other in *Ireland*, drew on each other for the amount of 280,000 *l.* and upwards, though neither took commiſſion money, yet each had a viſible profit from the exchange; therefore *ſuch drawing* and *re-drawing* was held to be a *trafficking in exchange*. *Ibid.* 751

27. Whether a man is a trader within the ſeveral ſtatutes againſt bankrupts, is a queſtion of *law*, not of *fact*. *Ibid.* 752

28. A *ſecond* commiſſion taken out, *pending a former*, under which a bankrupt has *not* obtained his *certificate*, is *void*. *Martin* v. *O'Hara*. 823

29. All the effects of the bankrupt taken under ſuch *ſecond* commiſſion (No. 28.) belong to the creditors under the *firſt*. *Ibid.* *Ibid.*

30. When a bankrupt is clearly entitled to his diſcharge, he needs not be ſurrendered by his bail. The court will, in the firſt inſtance, order an *exoneretur* to be entered on the bail-piece. *Ibid.* 824

Vide ARREST, No. 4. BOND. PARTNERS, No. 1, 2, 3, 4.

BARR.

Vide PLEADING, No. 6.

BARRATRY.

1. Barratry is every ſpecies of fraud in the maſter or mariners of a ſhip, by which the owners or freighters are injured; and a deviation, if owing to ſuch fraud, is barratry. Therefore, in ſuch circumſtances, the underwriters who have inſured againſt barratry, are liable, whether the loſs happened during ſuch fraudulent voyage, or after. *Valleſo* v. *Wheeler*. 143

2. *Secus*, if the deviation be with the privity or conſent of the owners. *Ibid.* *Ibid.*

BARON and FEME.

1. Re-delivery by *fême*, after death of *baron*, of a deed executed by her whilſt under coverture, is *equivalent* to a *new* grant, and binds her, without being re-executed or re-atteſted; and circumſtances alone may amount to ſuch re-delivery, though the original deed were a joint deed by *baron* and *fême*, affecting her land, and no fine levied. *Goodright* v. *Straphan*. *Page* 201

Vide MARRIAGE, No. 1.

BILL *of Exceptions*.

1. The court out of which a record iſſues, cannot take cognizance of a bill of exceptions tendered at the trial of the cauſe. *Symmers* v. *Regem*. 501

2. But if a ſpecial verdict be found in the ſame cauſe, (No. 1.) upon which the court below pronounces judgment; if that judgment be right, though they likewiſe proceed to hear and determine upon the bill of exceptions, that alone is not a ground for a court of error to reverſe the judgment. *Ibid.* 502—4

BILL *of Exchange*.

1. If the *indorſee* of a bill of exchange, who has received a *navy bill aſſigned* to the *drawee*, as a ſecurity to him (the indorſee) till the bill of exchange is excepted, depoſit ſuch navy bill with the drawee, and the drawee receive the money upon it, he (the drawee) is anſwerable for the amount in an *action for money had and received*, though he may have done nothing that amounts to an acceptance of the bill of exchange. *Purſon* v. *Dunlop*. 571

Vide ACCEPTANCE, No. 1, 2, 3.

BILL *of Middleſex*.

1. By the general rule and courſe of the *King's Bench*, the bill filed is the commencement of the ſuit. *Foſter* v. *Bonner*. 454

2. *Peers* may be ſued by bill. *Goſſet* v. Lord *Weymouth*. 544

Vide VERDICT, No. 2.

BOND.

It is a good conſideration for a bond, that the obligee will marry and ſettle a ſmall eſtate on a ſervant maid, and maintain a baſtard which the obligor had by her; and if the obligor become bankrupt, the bond may be proved under his commiſſion. *Ex parte Cottrell.* *Page* 742

Vide BANKRUPT, No. 13, 14. 21. INSOLVENT DEBTOR, No. 2.

BOUNTY.

The price of barley at the port where it is exported, is the rule by which to regulate the bounty on the exportation of *ſtrong-beer*; and not the average price of barley throughout the kingdom. *Whitbread* v. *Brookſbank.* 66

BY-LAW.

1. A by-law by the mayor and common council of *Exeter*, that no butcher or other perſon ſhould, within the walls of the ſaid city, ſlaughter any beaſt under pain to forfeit certain penalties therein ſpecified, is good, being not a *reſtraint* of trade, but only a regulation of it: And other inhabitants are bound as well as the members of the corporation. *Pierce* v. *Bartram.* 270

C.

CANCELLING.

VIDE REVOCATION, No. 1. WILL, No. 1, 2.

CASE.

Vide ACTION, No. 14. ASSUMPSIT. CORPORATION, No. 4.

CERTAINTY.

1. There are *three* kinds of *certainties*. 1. *Certainty* to a *certain intent in general*. 2. *Certainty* to a *common intent*. 3. *Certainty* to a *certain intent* in *every particular*. *Rex* v. *Horne.* *Page* 682

2. The *laſt* is *rejected* in all caſes, as partaking of too much *ſubtlety*: The *ſecond* is ſufficient in *defence*: And the *firſt* is required in a *charge* or accuſation. *Ibid.* *Ibid.*

CERTIFICATE.

1. A certificate by a rector to the biſhop, appointing *A. B.* curate of his church, promiſing to allow him a ſalary, and to continue him in the office till preferred or removed, *&c.* is no *contract* with the biſhop, but merely *information* to him of a matter of fact. The contract is with the *curate*. *Martyn* v. *Hind.* 443

2. If the biſhop ordain ſuch curate on the above title, it is a *licence* within the intent and meaning of the canon law. *Ibid.* *Ibid.*

Vide BANKRUPT, No. 1, 2.

CERTIORARI.

1. No *certiorari* lies on ſtat. 30 *Geo.* 2. *c.* 24. *Rex* v. *Smith.* 24

2. It lies *on the part of the proſecution* to remove an indictment on ſtat. 13 *Geo.* 3. *c.* 78. *ſect.* 24. for a nuiſance in a highway, before traverſe or judgment thereupon. *Rex* v. Inhabitants of *Bodenham.* 78

3. It does not lie to remove an indictment for *felony* from *Hicks's Hall*, without the conſent of the proſecutor. *Rex* v. *Ducheſs of Kingſton.* 283

4. It lies to remove a *preſentment* in a court leet. *Rex* v. *Roupell.* 458

CHARTER.

Where the words of a charter are doubtful, the uſage under it is of great force, in explaining the meaning. *Rex* v. *Varlo.* 250

Vide PRESUMPTION, No. 1, 2. LIMITATION, No. 2.

CODICIL.

Vide WILL, No. 6.

COLLEGE.

1. Independent members are mere boarders, and have no corporate rights, nor can appeal to the viſitor. *Rex* v. *Grundon & al.* *Page* 319
2. If a college do not exceed their juriſdiction, the King's courts have no cognizance; and expulſion is a matter entirely of their own juriſdiction. *Ibid.* 322
Vide EVIDENCE, No. 6. VISITOR, No. 1, 2.

CONSTABLE.

1. One who is a *reſiant* within a private leet, within a hundred, is not therefore *exempt* from ſerving the office of conſtable of the hundred. *Rex* v. *Genge.* 13
2. And a cuſtom to elect ſuch a one conſtable is good. *Ibid.* *Ibid.*

CONSTRUCTION.

Vide DEED. DEVISE. FRAUD. POWER. 4. STATUTES. WORDS.

CONTINGENCY.

An inſtance of a contingency, with a double aſpect. *Baldwin* v. *Karver.* 314

CONTRACT.

1. A contract, though not prohibited by poſitive law, nor adjudged illegal by precedent, may nevertheleſs be void, if againſt principles of morality or ſound policy. *Jones* v. *Randal.* 39
2. There are two ſorts of prohibitions in reſpect of contracts; 1ſt, To protect weak or neceſſitous men from being over-reached: And here the rule, *in pari delicto potior eſt conditio defendentis*, does not hold. 2dly, Prohibitions founded upon reaſons of public policy: there the above rule does hold. *Clarke* v. *Shee et al.* 200
This doctrine (No. 2.) exemplified. *Browning* v. *Morris.* 792

CONVICTION.

1. Proof of having *played* at *bowls*, will not warrant a conviction (and conſequent impriſonment) as an idle and diſorderly perſon. *Rex* v. *Clarke.* *Page* 55
2. A conviction on ſtat. 6 *Geo.* 1. *c.* 4. *ſect.* 1. muſt aſcertain the *coſts*, or is *bad*. *Rex* v. *Hall.* 60
3. In a conviction, it is ſufficient if enough appears, to ſhew that the evidence was given in the preſence of the defendant, *without* expreſsly ſtating that he was *preſent* at the time. *Rex* v. *Kempſon.* 241
4. If a juſtice of peace convict a perſon of more than *one offence* on the *ſame* day, by exerciſing his calling on a *Sunday* (contrary to ſtat. 29 *Car.* 2. *c.* 7.), it is an *exceſs* of juriſdiction, for which an action will lie before the convictions are quaſhed. *Cretty* v. *Durden.* 640
5. What evidence is inſufficient to convict a man of knowingly harbouring, &c. tea, &c. *Rex* v. *Hale.* 728, 9
6. *Quære*, if a conviction can be adjudged bad in part, and good for the reſt? *Ibid.* *Ibid.*

COPIES.

Vide EVIDENCE, No. 1. JOURNALS.

COPYHOLD. COPYHOLDER.

1. A leaſe for years by a copyholder (with licence) defeats the widow of her free bench, where ſhe would have been entitled to it, *if* her huſband had died *ſeiſed*; though there was only one inſtance produced of ſuch a leaſe by licence, before. *Salisbury ex dim. Cooke* v. *Hurd.* 481
2. Difference between free-bench and dower. *Ibid.* *Ibid.*
3. *Quære*, if copyholds are within the ſtat. 27 *Eliz. c.* 4.? *Doe* v. *Routledge.* 705
Vide LIMITATION, No. 6.

CORPORATION.

1. Under circumſtances of long acquieſcence, and where the objection would go to *diſſolve* the corporation, the court might not be inclined to diſturb it, though within twenty years. *Rex* v. *Carter.* 59

2. A *corporation* ſeiſed of lands in fee for their own profit, are to be conſidered as *inhabitants* and *occupiers* of ſuch lands, within the meaning of the ſtat. 43 *Eliz. c.* 2. and, in reſpect thereof, liable *in their corporate capacity* to be rated to the poor. *Rex* v. *Gardner.* *Page* 79
3. How proceſs ſhall go againſt a corporation. *Ibid.* 85
4. Caſe againſt a corporation for not repairing a creek into which the tide of the ſea *flowed* and *reflowed* (but not ſaying it was a *navigable river*) *as from time immemorial they had been uſed:* The action lies, though no ſpecial damage be ſtated. And, ſaying, "*as from time immemorial they* "*have been uſed,*" is well enough, without alleging that they were bound, *&c. ratione tenuræ*, or other ſpecial cauſe. Mayor of *Lynn* v. *Turner.* 86
5. Where the power of doing corporate acts is not ſpecially delegated to a particular number, the general mode is, for the members to meet on the charter days, and the major part who are preſent do the act. *Rex* v. *Varlo.* 250
6. Proceedings in *Chancery* againſt a corporation for a contempt, cannot lie againſt the offending parties *perſonally*, but muſt be by ſequeſtration of their effects and eſtate. *Rex* v. *Wyndham* 377
7. What is or is not a *diſfranchiſement.* *Symmers et al.* v. *Regem.* 502
8. In general it muſt be the act of the whole body. *Ibid.* 504
9. An order of *reſtoration* of a corporator *illegally* diſfranchiſed relates to the *original* right. *Ibid.* 503
10. How far the rights of the electors can be gone into, in a trial of the rights of the elected. *Ibid.* *Ibid.*
11. It *cannot* be done by ſurpriſe, and without notice, where the voter is in *poſſeſſion.* *Ibid.* *Ibid.*
12. Where the *right* of election is in *freemen* in their *corporate* deſcription; whether they were *duly choſen* or not, is not to be tried at the election of a *third* perſon. *Ibid.* 507
13. In a *quo warranto* againſt particular members, you cannot go into the title of other corporators *de facto.* *Ibid.* 508
14. The majority of mayor and aldermen for the time being, is ſufficient to conſtitute the corporate aſſembly of *Portſmouth.* *Rex* v. *Monday.* *Page* 538
15. When duly met, corporate acts may be done by the majority of thoſe who conſtitute the meeting. *Ibid.* *Ibid.*
16. In the election of a *member of parliament*, or a *verderor*, there is no way of defeating the election of one candidate, but by voting for another. *Secus*, in the buſineſs of corporations. *Ibid.* *Ibid.*
17. When a perſon is propoſed as alderman, the corporation may vote againſt him, without voting for another. *Ibid.* 539
18. Reſidence is not a precedent qualification for a *burgeſs* of *Portſmouth*, to entitle him to be elected alderman. *Ibid.* *Ibid.*
19. Objection of not having taken the *Sacrament*, how the ſtat. 5 *Geo.* 1. *c.* 6. applies to it. *Ibid.* *Ibid.*

Vide alſo *Harriſon* v. *Evans*, cited in *Acheſon* v. *Everitt.*

Vide COLLEGE, No. 1, 2. BY-LAW. INFANT.

COSTS.

1. *Quære*, if an informer in a *qui tam* action ſhall be obliged to give *ſecurity* for coſts, *Golding qui tam* v. *Barlow.* 24
2. To be paid by offenders againſt ſtat. 6 *Geo.* 1. *c.* 48. *ſect.* 1. muſt be *aſcertained* by the *conviction.* *Rex* v. *Hall.* 60
3. Coſts on a rule of *reference*, are coſts as between *party* and *party*, *not* as between *attorney* and *client.* *Marder* v. *Cox.* 127
4. The court will not ſtay proceedings till the plaintiff give ſecurity for coſts, though he live in the *Eaſt Indies.* *Nuncomar* v. *Burdett.* 158
5. The court will not ſtay proceedings in a *qui tam* action, till coſts on a *non proſ.* in a former action, by a different plaintiff againſt the ſame defendant, be paid. *Engliſh qui tam* v. *Cox.* 322
6. If a *qui tam informer* on the ſtat. 21 *Hen.* 8. *c.* 13. for *non-reſidence*, is

non-ſuited, the defendant is entitled to *coſts*. *Wilkinſon qui tam* v. *Allot*. *Page* 366

7. The ſtat. 18 *Eliz. c.* 5. extends to *qui tam* informers, as well as to thoſe who ſue for the whole penalty. *Ibid*. *Ibid*.

8. A plaintiff on the ſtat. 9 *Geo.* 1. *c.* 22. *ſect.* 7. is *not* entitled to coſts; becauſe it is a ſtatute *ſubſequent* to the ſtat. of *Glouceſter*, which gives coſts where *damages* were before recoverable. *Ibid*. 367

Vide EJECTMENT, No. 2. COVENANT, No. 6.

COVENANT.

1. Where there are covenants to be performed on each ſide, the defendant cannot take advantage of the non-performance of the plaintiff's covenant, by way of *ſet-off*; unleſs the plaintiff's covenant was for payment of a ſum of money. *Howlet* v. *Strickland*. 56

2. *Covenant*, "to permit plaintiff in "the laſt year of the term to ſow "clover among the barley and oats, "ſown by the defendant." *Breach*, "that the defendant ſowed barley "and oaths, *without giving notice* "to the plaintiff." Plea, "that "the defendant *did not prevent* the "plaintiff from ſowing as much clo-"ver as he thought fit;" and, upon demurrer, adjudged a *good* plea. *Hughes* v. *Richman*. 125

3. When a judgment for a penalty ſhall ſtand as a ſecurity for damages by the non-performance of covenants. *Goodwin* v. *Crowle*. 357

4. You cannot go to iſſue on a general averment of performance. *Sayre* v. *Minns*. 578

5. In a *declaration* in covenant, ſo much only of the *ſubſtance* of the *deed* and the *covenant* ſhall be ſet out, as will ſhew the plaintiff's title. *Dundaſs* v. *Lord Weymouth*. 665

6. If more be inſerted, the court will refer it to the maſter to ſtrike it out with coſts, and will animadvert upon the drawer of the declaration. *Ibid*. *Ibid*. *Vide* S. P. *Price* v. *Fletcher*. 727

7. If a leſſee covenant not to *under-let* without the conſent of the leſſor under *hand* and *ſeal*, with a power of reentry in caſe of a breach, *acceptance*, by the leſſor, of *rent* due *after* the *condition broken*, with *full notice*, is a *waiver* of the forfeiture. *Goodright* v. *Davids*. *Page* 803

8. Inſtance, where the act of the leſſee and his anceſtors, by *repeatedly inſerting* in different renewals of a leaſe for lives, a *covenant* to *renew under the ſame rent and covenants*, was held, to conſtrue ſuch covenant, tho' doubtfully worded, a covenant for a *perpetual renewal*. *Cooke* v. *Booth*. 819

Vide JUDGMENT, No. 1. SET-OFF, No. 1.

COVERTURE.

Vide BARON and FEME.

COURT.

Vide INFERIOR COURT.

CREDITOR.

Vide BANKRUPT.

CROSS REMAINDER.

Vide REMAINDER, No. 1, 2, 3. DEVISE, No. 26.

CURATE.

1. Cannot be removed *without cauſe* by the rector, who has appointed him by certificate to the biſhop, promiſing to allow him a ſalary and to continue him in the office till otherwiſe provided of ſome eccleſiaſtical preferment, unleſs lawfully removed for any fault. *Martin* v. *Hind*. 437

2. If removed for any fault, he ſhould have notice. *Ibid*.

3. *Quære*, If he may not be removed by the biſhop? 441

Vide ASSUMPSIT, No. 8. CERTIFICATE, No. 1. 2. SURPRISE.

CUSTOM.

1. "Ancient cuſtom" (found in a ſpecial verdict) means "immemorial "cuſtom." *Rex* v. *Genge*. 17

2. A cuſtom for the lord of the manor, on every death or alienation, to take the ſecond beaſt beſt, adjudged to be ill

ill ſet out, for want of ſtating the exemption of certain tenures, and which exemption was proved at the trial. *Griffin* v. *Blandford*. *Page* 62
Vide CONSTABLE, No. 2.

D.

DAMAGES.

IN *perſonal torts*, the court will never grant a *new trial* for *exceſſive* damages, unleſs they are ſuch as *manifeſtly* ſhew the jury to have been actuated by *paſſion*, *partiality*, or *prejudice*. *Gilbert* v. *Burtenſhaw*. 230
Vide COVENANT, No. 3.

DECLARATION.

1. On a declaration upon a corrupt contract made the 21ſt of *December* 1774, giving day of payment to the 23d of *December* 1776, and *iſſue* thereon; evidence of a contract on the 23d of *December* 1774, for *two* years, will not ſupport the iſſue. *Carliſle qui tam* v. *Trears*. 671
2. *Declaration* that the defendant uſed a gun, *being an engine to kill and deſtroy the game*, is good, *after verdict*. *Avery* v. *Hoole*. 825
3. *Quære*, if good upon a *ſpecial demurrer*? *Ibid.*
4. Declaration that the defendant on the 6th of *May*, and on *divers other days and times between* that day and the commencement of the ſuit, *aſſaulted* the plaintiff, is bad. *Michell* v. *Neale*. 828
5. Declaration againſt the defendant *only*, ſtating that *he* and *another* made their promiſſory note, by which they *jointly* OR *ſeverally* promiſed to pay, is good. *Rees* v. *Abbott*. 832
Vide COVENANT, No. 5, 6. EXECUTOR, No. 3, 4. LATITAT. VARIANCE, No. 1, 4, 5. VENUE, No. 1. VERDICT, No. 1.

DEEDS.

1. One by deed, in conſideration of love and affection to his name, and blood, &c. and for ſettling *the one undivided moieties* of his manors, lands, &c. therein-after mentioned, grants the ſame *undivided moieties*, (particularly deſcribing them,) *together with all other his lands, tenements, and hereditaments in the kingdom of* Ireland, *habendum* the ſaid *undivided moieties* before granted, *together with all other his eſtate in the kingdom of* Ireland, to *A.* to the ſeveral *uſes* therein-after *declared*, and *for no other uſe whatſoever*; and then declares the *uſes* of the undivided *moieties only*: Held, that the grantor did not intend to paſs any lands but the undivided moieties. *Moore* v. *Magrath*. *Page* 9
2. The rule of law in reſpect of the conſtruction of deeds is, that they ſhall operate according to the intention of the parties, if by law they may: And if they cannot operate in one form, they ſhall operate in that, which by law will effectuate the intention. *Goodtitle* v. *Bailey*. 600
Vide BARON and FEME. USES. RELEASE.

DEVIATION.

Vide INSURANCE, No. 1. BARRATRY, No. 1, 2.

DEVISE.

1. A deviſe to a *ſon* of which the teſtator ſuppoſed his wife to be *enſient*, when he ſhould be 21 years old; but if a *daughter*, then, one *moity* of his eſtate to his *wife*, and the *other moiety* to his *two* daughters (there being one at that time) at the age of twenty-one; if either of the daughters die before that time, her ſhare to the ſurvivor; if both die before that time, both their ſhares to the wife in fee; if ſhe die, her ſhare to the daughters. The teſtator died; the wife was not *enſient* at the time of the will, or at his death. The *daughter* died under age, and *without iſſue*. The wife ſhall take the *whole* eſtate. *Statham* v. *Bell*. 40
2. One deviſes certain lands to truſtees, *in caſe his perſonal eſtate ſhall not be ſufficient for the payment of debts*, &c. in

in aid of it; and "*all the reſt, reſidue "and remainder* of his *real* and *per-"ſonal* eſtate to his *wife.*" The perſonal eſtate proved ſufficient.—The *lands* deviſed in aid, paſs to the *wife* by the reſiduary clauſe.—So, if the perſonal eſtate had proved deficient *in part only*, the wife would have been entitled to the remainder. *Goodtitle* v. *Knot.* *Page* 43

3. A deviſe of land in *England* is conſidered in a different light from a *Roman* will; the *latter* being conſidered as an *inſtitution* of the *heir*; the *former*, as a *conveyance* by way of *appointment*. *Harwood* v. *Goodright*. 90

4. One, poſſeſſed of *three* ſpecies of eſtates in the county of *H. viz.* one by articles *wholly executory*, another *executory* in *part*, and a third (being an *advowſon*) completely *executed* by a recent conveyance, deviſes to his wife as follows, "All the manors, "meſſuages, *advowſons*, and here-"ditaments in the county of *H.* for "the *purchaſe* whereof I have already "*contracted* and *agreed*, or, *in lieu* "*thereof*, the money ariſing by the "ſale of my real eſtate in the county "of *L.*" (with directions for completing the contracts.) The *advowſon*, the purchaſe of which was completely *executed* before the making of the will, ſhall paſs to the wife. *St. John* v. *The Biſhop of Winton*. 94

5. Deviſe to *T. G. for and during his natural life*, and after his deceaſe to *his heirs* and aſſigns for ever, and, *for want of ſuch heirs*, to *T. E.* his heirs and aſſigns for ever. *T. G.* has only an *eſtate tail*. *Morgan & Uxor* v. *Griffith*. 234

6. To make a deviſe of lands *without* any *limitation*, a *fee*, ſuch a manifeſt intention muſt appear, that the teſtator *meant* to give a fee, as may ſatisfy the *conſcience* of the court, in pronouncing it ſuch. If it is barely problematical, the rule of law muſt take place. *Roe* v. *Blacket*. 235

7. A deviſe to the teſtator's eldeſt ſon of 200*l.* alſo to his three younger ſons *G.*, *W.* and *G.* and their *heirs*, a houſe and cloſe as *tenants in common*, *when they come at age of* 21 *years*; alſo, to his *wife* a houſe, and after her deceaſe the ſame to go to his three daughters and their heirs for ever. And his will further was, that *if* ANY *of his above-named children* ſhould happen to die *before they came of age*, and without iſſue, then *their* property and ſhare in *any* of the above bequeathed premiſes to be *equally* divided *amongſt the* REST *of his ſurviving children*, ſhare and ſhare alike. The *eldeſt* ſon was of *age* at the date of the will; two of the *younger* ſons died *under age*, &c. *Per cur*—The *eldeſt* ſon and the three *daughters* are equally entitled with the *younger* ſon, to the ſhares of the deceaſed brothers. *Denn* v. *Balderſton*. *Page* 257

8. One, ſeiſed of the lands of *C.* and *G.* in *fee*, of other lands in *B.* and *S.* for *lives renewable for ever*, and of other lands under leaſes for *three lives*, with *reverſionary* terms for twenty-one years from the death of the *ſurviving* life in each; and being himſelf the ſurviving life in one, deviſes thus: *And as to all my worldly ſubſtance*, I give to my *mother*, my houſe and land of *G.* with the appurtenances, *during her natural life*, clear of any deduction; and alſo my lands of *C.* (ſubject to a rent payable thereout) *for life*, with *liberty of committing waſte thereon*; and after ſeveral legacies to relations, (one of which was the heir at law,) he deviſes to his *mother*, *all the* REMAINDER *and* RESIDUE *of all his* EFFECTS *both* REAL *and* PERSONAL, which he ſhall die poſſeſſed of. The *mother*, by this reſiduary clauſe, takes a *fee* in all the teſtator's fee-ſimple eſtates, and the whole of his intereſt in the reſt of his real property; ſubject to the charges thereon. *Hogan* v. *Jackſon*. 299

9. Diſtinction between the *Roman* law concerning wills, and our law of deviſes. *Ibid.* 305

10. Words of *perpetuity* in a deviſe, are *tantamount* to words of *limitation*. *Ibid.* 305

11. The diſtinction between words that denote only a *deſcription of the ſpecific eſtate*, and words that denote the *quantum of intereſt that the teſtator has in it*. *Ibid.* *Ibid.*

12. Effect

12. Effect of introductory words in a will, what. *Hogan* v. *Jackson*. See No. 21, 22, 23.

13. *Real effects* mean real property. *Ibid.* *Ibid.*

14. An objection that the teſtator firſt gave his mother only an *eſtate for life*, and made it *liable to impeachment of waſte*, is not ſufficiently ſtrong to controul the operation of ſubſequent words in a reſiduary clauſe, manifeſtly importing an intention to give a fee. *Ibid.* 308

15. Deviſe to truſtees in truſt for the uſe of the *heirs male* of *J. A.*: and in *default of ſuch iſſue*, to the uſe of the *heirs male* of *R. A.*: and *in default of ſuch iſſue male*, to the uſe of *all* and *every* the *grand-children* of *J. A.* and *S. M.* as *tenants in common*. A codicil (bearing the ſame date as the will) directs truſtees to pay the intereſt and produce of his real and perſonal eſtate to the teſtator's wife *S. A.* and to the ſaid *J. A.* and *R. A.* during their lives, with ſurvivorſhip. *Eight* grand-children of *J. A.* and *S. M.* were alive at the date of the will; a *ninth* was born *before* the teſtator died; *twelve* more were born *after* his deceaſe; and *all* in the life-time of *R. A.*, who, as well as the deviſee *J. A*, died without iſſue. Held, that as the 21 grand-children were *all* alive *at the death of R. A.*, *all* were *equally* entitled. *Baldwin* v. *Karver*. 309

16. *Diſtinction* between an *immediate* deviſe to *children*, and a *proviſion* for them in *marriage ſettlements*, or a deviſe *limited* to them by way of *remainder*, or upon a *contingency* uncertain in event: The *firſt* only relates to children *in eſſe at the time*; the *ſecond* is intended equally for *all* the children of the *marrige*; the *laſt* extends to *all* that are *in eſſe at the time* when the deviſe *veſts*. *Ibid.* 314

17. One deviſes thus: "*As touching* "*my worldly eſtate*, I deviſe the ſame "as follows: I give to my wife *E. M.* "5 *l.* to be paid yearly out of my "eſtate at *G.*—*Item*, to my ſon *T. M.* "and daughter *E.* 5 *l.* each, to be paid "twelve months after my deceaſe. "—*Item*, to my ſons *I. M.* and *R.* "*M.* whom I make my——and "ordain my *ſole executors*, *all my lands* "*and tenements freely to be enjoyed and* "*poſſeſſed* ALIKE."—*I. M.* and *R. M.* are *tenants in common*, and take a *fee*. *Loveacres* v. *Blight*. *Page* 352

18. One deviſes ALL *his eſtate*, &c. in the counties of *Glouceſter* and *Worceſter* and *elſewhere in the kingdom of England* to truſtees, *ſubject* to certain *charges* thereon, and limitations in his *marriage ſettlement named*; in *truſt*, to ſtand ſeiſed of the ſaid eſtates in *Glouceſter* and *Worceſter* or *elſewhere*, to certain uſes. His eſtates in *G.* and *W.* were the *only eſtates charged* or mentioned in his marriage ſettlement. But he was alſo entitled to a *reverſion* of certain eſtates in the counties of *Oxford* and *Wilts*. Held that this *reverſion* paſſed by the words "*elſewhere in the kingdom of Eng-* "*land.*" *Freeman* v. *Duke of Chandos*. 363

19. Deviſe to *S. S.* and the *heirs of his body* lawfully to be begotten, and *their heirs for ever*, *charged* with the payment of 8 *l. per annum* to *M. S.* during her life; but in caſe the ſaid *S. S. ſhall die without leaving iſſue of his body*, then unto *W. G.* and his *heirs*, *charged* as aforeſaid, and *alſo* with 100 *l.* to *A. B.* within one year after *W.* or his heirs ſhall be poſſeſſed of the lands deviſed.—*S. S.* takes only an *eſtate tail*. *Denn* v. *Shenton*. 410

20. One deviſes a *reverſion* to *his right heirs*, and afterwards gives all the *reſidue* and remainder of his real and perſonal eſtate to *A. B.* in fee.—The *reverſion* does not paſs by this reſiduary deviſe. *Doe* v. *Saunders*. 420

21. One deviſes, "*as to all ſuch world-* "*ly eſtate as God has endued me with*, "I give as follows: "I deviſe *all* that "my *freehold meſſuage*, *lying* in *G.*, to "*M. R.*, *G. R.* and *T. R. equally*." And afterwards, amongſt other legacies, he gives *ten* ſhillings to his *heir* at law. The deviſees, notwithſtanding the *introductory words*, and the *diſinheriting legacy* to the *heir*, take only an eſtate for *life*, and are tenants *in common*. *Den* v. *Gaſkin*. 657

22. To make ſuch introductory words (No. 21.) operate as an *enlargement* of a deviſe of lands, *without* words of

of *limitation* added, they must be *connected* with such devise. *Den* v. *Gaskin*. *Page* 660

23. The court will make great use of the introduction of a will, in favour of the *clear intention* of the testator, and in favour of creditors, to make a real estate liable to debts. *Ibid. Ibid.*

24. I give to one "in fee-simple," or "all my estate," are *tantamount* to words of *limitation*. *Ibid. Ibid.*

25. One devises his lands to his brother for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of his brother in tail male successively, remainder to his brother's daughters in tail; remainder to *his four sisters and a niece for their lives, share and share alike as tenants in common*, and not as joint-tenants, remainder to their *sons successively* in *tail*, remainder to their *daughters* in tail; *reversion* to *his own right heirs*. Then he devises to another sister only a small annuity.—The *four* sisters and the *niece* take *several* estates for life, with *several remainders* to their sons and daughters: And there are *no cross-remainders*. *Pery* v. *White*. 777.

26. One devises to his two brothers and his sister, and the *heirs of their bodies*, as *tenants in common*, and not as joint-tenants, and for *want of such issue*, to his own *right heirs*: And then gives all the rest and residue of his goods and chattels, as well real as personal, equally between his said brothers and sister, share and share alike. The devisees take *cross-remainders*. *Phipard* v. *Mansfield*. 799

27. By a devise, of *all that* the testator's *manor* of *C.*, *&c.* and also *all* that his capital messuage, and *all* and every his *lands* tenements and hereditaments whatsoever, *situate and being in or near P. P.* or ELSEWHERE *in the county of Gloucester*, to his executors, upon *trust* to *sell* and divide the money *equally* amongst his younger children; a *remote reversion in fee*, in another estate in the *county of Gloucester*, to which the testator was entitled, after three estates tail, was held to pass to the trustees. *Atkyns* v. *Atkyns*. 808

28. A testatrix devised a messuage and lands to her eldest daughter *A.* and the *heirs of her body for ever*, and for *want of such issue* to her 2d, 3d, and 4th daughters successively *in tail, charged* and *chargeable* nevertheless with 180 *l.* to be levied out of the first *annual profits*, and to be divided *equally* amongst the *three younger daughters*: And that the *executors* should *stand seised* of the said messuage and lands, from the decease of the testatrix, *for so long time* as they or their assigns should have *raised* the said sum, or *so long as until* the same should be discharged by the said *A. or her heirs*: And *from* and immediately after the *raising*, *&c.* or *other payment* of the said sum, by *A. or her heirs*, then that *A. and her heirs* should enjoy the said messuage, *&c. for ever*; only allowing the three younger daughters and a cousin, the use of some rooms, till they were married. Held, that *A.* took only an estate *tail*. *Hanson* v. *Fyldes*. *Page* 833

Vide REMAINDER, No. 1, 2, 3. TENANT *in Common*, No. 2.

DISCHARGE.

Vide ARREST, No. 2, 4.

DISCONTINUANCE.

1. Cannot be worked by a secret feoffment by tenant in tail under a *naked* possession. *Doe* v. *Horde*. 702

DISFRANCHISEMENT.

Vide CORPORATION, No. 7, 8, 9.

DISSEISIN.

1. Possession under a judgment in ejectment, can never amount to a *disseisin* of the *freehold*. *Doe* v. *Horde*. 701

2. But such possession (No. 1.) enures, according to the right of the party recovering, whether it be a right of freehold in possession, in tail, or in fee. *Ibid.* *Ibid.*

3. A *secret feoffment* under a *naked* possession by tenant in tail in remainder to

to the mere intent to make a tenant to the *præcipe*, cannot *work* a diſſeiſin to the *advantage* of the *feoffor*. *Doe* v. *Horde*. *Page* 702

4. But the *true owner* may *elect* to *make* it a diſſeiſin. *Ibid.* *Ibid.*

DISTRESS.

1. Cannot be made for the toll of goods *fraudulently* ſold *out* of a *market* to avoid the *toll*. But the party injured muſt bring a *ſpecial action* on the caſe. *Blakey* v. *Dinſdale*. 661

E.

ECCLESIASTICAL COURT.

VIDE PROHIBITION.

EJECTMENT.

1. A man ſhall not defend himſelf in it, by an eſtate which makes part of the title of the leſſor of the plaintiff. *Hart* v. *Knott*. 46

2. If the leſſor of the plaintiff be an *infant*, and the *guardian* undertake for *coſts*, it is ſufficient. *Anonymous*. 128

3. The leſſor of the plaintiff in ejectment ſhall not be permitted to defeat *a ſolemn deed under his own hand*, covenanting that the defendant ſhall *enjoy* the premiſes, and for further aſſurance. *Goodtitle* v. *Bailey*. 597

Vide NOTICE, No. 4. TRUST, No. 2.

ELECTION. ELECTOR. ELECTED.

1. Where money is given to be laid out in *land*, or *government ſecurity*, a *common perſon* has his *election*; but a *charity* has *not*; becauſe one alternative is unlawful. *Foone* v. *Blount*. 467

Vide CORPORATION, No. 10, 11, 12, 13, 14, 15, 16, 17. EVIDENCE, No. 7.

EMBARGO.

Vide INSURANCE.

EQUITY.

Conſiders that which is *to be* done as if it *was* done, &c. *Foone* v. *Blount*. *Page* 467

Vide POWERS, No. 4.

ERROR.

1. On a writ of error from the *King's Bench*, in *Ireland*, only a *tranſcript* of the record is ſent over to the *B. R.* in *England*; and if the judgment be affirmed, ſuch tranſcript is ſent back by writ of *mittimus* to the *King's Bench* in *Ireland*, and that court muſt iſſue the ſubſequent proceſs. *Vicars* v. *Haydon*. 843

2. So on a writ of error from the *B. R.* in *England* to the *Houſe of Lords*, only a *tranſcript* of the record is ſent up; and when remitted, the *King's Bench* awards execution. *Ibid.* *Ibid.*

3. But on a writ of error from the *C. B.* though a tranſcript only is removed into the *King's Bench*, the *latter* may award execution. *Ibid.* *Ibid.*

ESCAPE.

Vide EVIDENCE, No. 3.

ESTATE for *life*, in *tail*, or in *fee*.

Vide DEVISE.

EVICTION.

Vide RENT, No. 1, 2.

EVIDENCE.

1. In an action upon a *wager* whether a decree of the court of *Chancery* would be reverſed on appeal to the Houſe of Lords, a *copy* of the *reverſal* is ſufficient evidence, *without* producing the *minute book* itſelf; and ſuch copy need *not* be on *ſtamps*; neither is it neceſſary, on the trial of ſuch an action, to ſhew the previous proceedings: Proof of the decree, and of its being reverſed, is ſufficient. *Jones* v. *Randall*. 17

2. Parol evidence muſt be let in to explain the intent of the teſtator in cancelling

celling a will. *Burtenſhaw* v. *Gilbert.* Page 53

3. In debt for an eſcape againſt the ſheriff, the indorſement of *non eſt inventus* upon the *ca. ſa.* is ſufficient evidence of its having been delivered to him. *Blatch* v. *Archer.* 63

4. A legal arreſt muſt be proved in ſuch action (No. 3.) *Ibid.* *Ibid.*

5. The bailiff's name endorſed on the writ is ſufficient evidence that he was *authoriſed* by the ſheriff to arreſt, without proving the warrant. *Ibid.* 66

6. A ſentence of expulſion (unappealed from) given in evidence on an indictment for aſſaulting a fellow commoner of *Queen's College, Cambridge*, by turning him out of the garden, is *concluſive* for the defendant; and conſequently, evidence on the part of the proſecutor, to prove the irregularity of ſuch ſentence, is inadmiſſible. *Rex* v. *Grundon.* 315

7. Evidence of an *order* of *reſtoration* of a burgeſs, together with proof of his having acted as ſuch, is ſufficient to ſhew that he is a burgeſs *de facto*, *without* proving that he was *actually admitted*. *Symmers* verſus *Regem.* 502

8. An *order* of *reſtoration* of a voter illegally diſfranchiſed, *relates* to the *original* right, and may be given in evidence to ſhew that his vote at an election ought to have been received; though ſuch election were had, prior to the date of the order. *Ibid.* 503

9. *General declarations* of a parent are good evidence after his or her death, to prove *that a child was* BORN *before marriage*; but *not* to prove that a *child, born in* WEDLOCK, *is a baſtard*. *Goodright* v. *Moſs.* 591

10. So, the *anſwer* of one of the parents to a bill in *Chancery*, is admiſſible to prove ſuch birth: For it is not like offering a depoſition or an anſwer in evidence, againſt a perſon not a party to the original ſuit: But it is offered only as evidence under her hand of her having made ſuch a declaration. *Ibid.* 594

11. So, parents may be admitted to prove the *fact* of the *marriage* on a queſtion upon the legitimacy of the child. *Ibid.* 593

12. But *not* to prove *non-acceſs*. *Goodright* v. *Moſs.* Page 594

13. *Tradition* is evidence in queſtions of *pedigree*. *Ibid.* *Ibid.*

14. So are *circumſtances* that ſhew *illegitimacy*. *Ibid.* *Ibid.*

15. So are an entry in a family Bible, an inſcription on a tombſtone, or a pedigree hung up in the family manſion. *Ibid.* *Ibid.*

16. How far poſſeſſion of twenty years is evidence of a fee, and when it may be preſumed. *Denn ex dim. Tarzwell* v. *Barnard.* 595

17. *Indecency* of evidence is no objection to its being received, where it is *neceſſary* to the deciſion of any *civil* or *criminal* right. *Da Coſta* v. *Jones.* 734

18. *Secus*, if it ariſe upon a *voluntary wager* between two *indifferent* perſons: as, upon a wager concerning the *ſex* of a *third* perſon. *Ibid.* 736

19. In a queſtion upon the *cuſtom* of *tithing* in the pariſh of *A.*, evidence that ſuch a cuſtom exiſts in the *adjacent pariſhes*, is *not admiſſible*. *Secus*, if the cuſtom be laid as the *general cuſtom* of the *whole county*. *Furneaux* v. *Hutchins.* 807

EXCEPTIONS.

Vide BILL of EXCEPTIONS.

EXCHANGE.

Vide BILL of EXCHANGE.

EXCISE.

1. The bounty allowed on the exportation of ſtrong beer by ſtat. 1 *G.* 3. *c.* 7. *ſect.* 6. (which refers to ſtat. 1 *W. & M. c.* 12.) muſt be governed by the *price* of barley at the *port* where *exported*, and *not* by the *average* price throughout the kingdom. *Whitbread* v. *Brookſbank.* 66, 9

Vide ACTION, No. 1. BOUNTY, No. 1, 2.

EXECUTION.

Vide BAIL, No. 2. ERROR, No. 1, 2, 3. WARRANT of ATTORNEY, No. 2.

EXECUTOR.

1. On a *perſonal* demand againſt an executor, there can be no judgment *de bonis teſtatoris*. *Hawkes & Ux.* v. *Saunders*. *Page* 289
2. Having aſſets is a ſufficient conſideration for a promiſe by him to pay a legacy. *Ibid.* 290
3. Declaration, that *G. S. by will bequeathed a legacy to the plaintiff, and made the defendant executrix; that ſhe proved the will, and had aſſets ſufficient to pay all debts and legacies, and by reaſon thereof became liable to pay the legacy, and being ſo liable, promiſed, &c.* is a declaration againſt the defendant *in her own right*; and therefore the plaintiff cannot take judgment *de bonis teſtatoris*. *Ibid.* 292
4. But, if *aſſets* be *proved* (or *admitted*) and an aſſent of the executor to the legacy, judgment may be given, on ſuch a declaration, *de bonis propriis*; becauſe, having aſſets is a ſufficient conſideration. *Hawkes et Ux.* v. *Saunders*. 293
5. *Quære*, Whether, *without ſuch aſſent*, (No. 4.) he could be compelled by an action *at law* to pay it? *Ib.* 292
6. What actions ſurvive againſt an executor. *Hambly* v. *Trott*. 375
7. Diſtinction, as to actions, which *ſurvive* againſt an executor or *die with the perſon*, on account of *the cauſe of action*, and which *ſurvive*, *&c.* or *die*, *&c.* on account of *the form of action*. *Ibid.* *Ibid.*
8. Where the *cauſe* of action is money due; or a contract to be performed; gain or acquiſition by the labour or property of another; or a promiſe by the teſtator expreſſed or implied, the action ſurvives againſt the executor. *Secus*, if it be a *tort* or ariſe *ex delicto*, ſuppoſed to be by force and againſt the peace, or where the plea to the action muſt be, that the *teſtator* was *not* guilty. *Ibid.* *Ibid.*

Vide ACTION, No. 7. ASSUMPSIT, No. 4, 5.

EXEMPTION.

Vide IMPRESSING SEAMEN.

F.

FACTOR.

1. A FACTOR who is ſurety (in a bond) for his principal, has a lien on the price of the goods ſold by him for his principal to the amount of the ſum he is bound for. *Drinkwater* v. *Goodwin*. *Page* 251
2. It is a general rule, that where a factor who is authoriſed to ſell goods in his own name, makes the buyer *debtor* to *himſelf*; though he is not anſwerable to his principal for the *debt*, if the money be not paid, yet he has a right to receive it, if it is; and his receipt is a diſcharge to the buyer. *Ibid.* 255, 6
3. He may compel ſuch payment (No. 2.) by an action: and it would be no defence in ſuch action for the buyer to ſay, that the principal was indebted to him in more than that amount. *Ibid.* *Ibid.*

Vide INDEMNITY.

FALSE IMPRISONMENT.

Vide TRESPASS.

FEES.

1. If an offender convicted in *B. R.* receive ſentence to be ſet on the pillory in a different county, the proſecutor is not bound to pay the tipſtaff any fees, or even the neceſſary expences of carrying the offender thither. *Rex* v. *Cholſey*. 726

FEME COVERT.

Vide BARON and FEME.

FEOFFMEMT.

1. The nature and operation of feoffments of old, attended with livery and actual tranſmutation of the poſſeſſion from one man to another. *Doe* v. *Horde*. 702—704
2. The nature and operation of a *ſecret* feoffment, with livery in *form* only *to the mere intent to make a tenant to the præcipe*, by one who has *not* a *right* to ſuffer a recovery. *Ibid.* *Ibid.*

3. No transmutation of the poſſeſſion paſſes to the *feoffee* by it. But he is a mere *inſtrument of form*. *Ibid.* *Page* 704

4. It conveys no eſtate, nor will courts of law carry it into execution, to the *prejudice* of the rightful owner. *Ibid.*

FICTION.

1. A fiction of law ſhall never be contradicted ſo as to defeat the end for which it was invented; but for every other purpoſe it may be contradicted. *Moſtyn* v. *Fabrigas*. 177

Vide WRITS, No. 1.

FINE.

1. In proving it, you muſt ſhew that the conuſor was in poſſeſſion, or had received rent. *Doe* v. *Williams*. 622

FOREIGN LAWS.

1. Muſt be proved as facts if a queſtion ariſe on their exiſtence. *Moſtyn* v. *Fabrigas*. 174

FORFEITURE.

Vide ACCEPTANCE of RENT. COVENANT, No. 7. PENALTY.

FRAUD.

1. The ſtatutes 13 *Eliz. c.* 5. and 27 *Eliz. c.* 4. cannot receive too liberal a conſtruction, or be too much extended in ſuppreſſion of fraud. *Cadogan* v. *Kennet*. 434

2. But ſuch a conſtruction is not to be made in ſupport of creditors, as will make third perſons ſufferers. *Ibid.* *Ibid.*

3. If a tranſaction be not *bonâ fide*, its being for a *valuable conſideration*, will not *alone* take it out of the ſtatute; nor even in ſome caſes a change of poſſeſſion. *Ibid.* *Ibid.*

4. Thus, the purchaſe of a debtor's goods, knowing of a ſequeſtration by *Chancery*, or of a judgment and execution, though made for a valuable conſideration, is void. *Ibid.* *Ibid.*

5. Poſſeſſion of *goods* is evidence of fraud. *Secus* of a leaſe *Ibid.* *Ibid.*

6. The ſtatute 27 *Eliz. c.* 4. does not go to *voluntary* conveyances, *merely* as being *voluntary*, but to ſuch as are *fraudulent*. (See No. 8.) *Ibid.* *Page* 434

7. The circumſtance of a man's being indebted at the time of a voluntary conveyance, is an argument of fraud. The queſtion, therefore, is, Whether it was done *bonâ fide*, or to *defeat creditors? Ibid.* 435

8. To make a *voluntary* ſettlement *void* againſt a ſubſequent purchaſer, within the ſtatute 27 *Eliz. c.* 4. it muſt be *covinous* and *fraudulent*, not *voluntary* only. *Doe* v. *Routledge*, 705. 708.

9. A purchaſer, to entitle himſelf to the protection of the ſtat. 27 *Eliz. c.* 4. againſt a *fraudulent* ſettlement, and to *ſet it aſide*, muſt be a purchaſer *bonâ fide*, or for *good conſideration*, or *marriage*. *Ibid.* *Ibid.*

10. But he need not be a purchaſer for *money*. *Ibid.* *Ibid.*

Vide ASSUMPSIT, No. 2, 3. SETTLEMENT, No. 3.

FREE-BENCH.

Vide COPYHOLD, No. 1, 2.

G.

GAME.

VIDE DECLARATION, No. 5.

GAMES.

1. Playing at *bowls*, *out of Chriſtmas*, ſubjects every *labourer* to a penalty of 20 *s.* by ſtat. 33 *Hen* 8. *c.* 9. ſect. 16.; but does not make ſuch offender puniſhable as an *idle and diſorderly perſon*, under ſtat. 17 *Geo.* 2. *c.* 5. *Rex* v. *Clarke*. 35

GAMING.

A *foot-race* is a game within the ſtat. 9 *Anne*, *c.* 14. therefore any wager upon

upon it, is void; and one perſon running alone (againſt time) is a footrace, within the ſtatute. *Brown* v. *Berkeley.* *Page* 281

Vide WAGER.——*Vide* ASSUMPSIT, No. 13, 14.

GRANT.

Vide PRESUMPTION, No. 1, 2. LIMITATION, No. 2.

H.

HABEAS CORPUS.

1. AN information, *qui tam*, on ſtat. 8 G. 1. *c.* 7. for a fraud in weighing and packing butter, exhibited (by virtue of the ſaid ſtatute) in the ſheriff's court at *York*, may be removed into *B. R.* by *hab. corp. cum cauſâ*. *Hartley qui tam* v. *Hooker.* 523

2. A writ of *habeas corpus*, if not ſigned by a judge, need not be obeyed. *Rex* v. *Roddam.* 672

3. A writ of *habeas corpus ad teſtificandum*, to bring up a ſailor on board a ſhip, who is *not* detained there as a *priſoner*, ought *not* to be granted, *without* an affidavit, that he has been *ſerved* with a *ſubpœna*, and is *willing* to *attend*. *Ibid.* *Ibid.*

HEIR.

1. An heir at law cannot be diſinherited by the plaineſt intention apparent on the face of the will, unleſs the eſtate is completely diſpoſed of to ſomebody elſe. *Denn* v. *Gaſkin.* 661

Vide DEVISE.

HIGHWAY.

1. Muſt, in a preſentment, be alleged to lie *in the pariſh*; otherwiſe, the pariſh is not bound to repair. *Rex* v. *Inhabitants of Hartford.* 111

2. The power of two juſtices, under ſtat. 13 G. 3. *c.* 78. *ſ.* 16. to order any highway to be widened, extends to roads repairable *ratione tenuræ*; and upon diſobedience to ſuch order, the party may either be proceeded againſt ſummarily under the ſtatute, or by indictment. *Rex* v. *Balme.* *Page* 648

HUNDRED. *Vide* CONSTABLE.

I.

IDENTITY.

1. OF money or notes, if it can be traced, will entitle the true owner to maintain *aſſumpſit* againſt a *third* perſon, into whoſe hands they have come *malâ fide*. *Clarke* v. *Shee et al.* 197—200.

Vide ACTION, No. 4.

JEOFAILS.

The ſtatutes of jeofails extend to *penal* actions, though not to criminal proſecutions. *Atcheſon* v. *Everitt.* 392

IMPLICATION.

1. Where lands are deviſed *without words* of *limitation*, and the lands are *charged with a groſs ſum*, the deviſee by implication of law takes a *fee*; becauſe the manifeſt intent of the teſtator being deciſive, and no technical form of words neceſſary to expreſs it, the certainty that the teſtator muſt mean a bounty to his deviſee is ſufficient to ſupply the want of a formal limitation. *Doe* v. *Fyldes.* 841

2. But where an *expreſs* eſtate for *life*, or an *expreſs* eſtate *tail*, is given in terms, no ſuch implication can ariſe from ſuch charge only. *Ibid.* *Ibid.*

INDEMNITY.

1. It is not in the power of any man, by his election, to vary the rights of two other contending parties. And therefore, if after giving notice to ſuch perſon to hold his hand, and offering him an indemnity, he takes upon himſelf to decide the right, he ren-

ders himself answerable to the true owner. *Drinkwater* v. *Goodwin*. *Page* 255

2. For this reason, though a purchaser of goods from a factor has a right to pay him the money and be discharged; yet, if the principal and factor have a dispute, the buyer, with notice of such dispute, and an indemnity offered him, has no right to prejudice the title of the principal. *Ibid.* *Ibid*

INDICTMENT.

1. *Knowingly exposing to sale* and selling wrought *gold under* the sterling *alloy*, as, and for, gold of the true standard weight, is not indictable in a *private* person: the statutes relate only to *goldsmiths*.—And it is not a common law offence, being only a private cheat. *Rex* v. *Bower*. 323

2. An indictment consisted of two counts; one for a *riot*, the other for an assault; and the jury indorsed *ignoramus* on the first, and *billa vera* on the second: And it was held *good*. *Rex* v. *Fieldhouse*. 325

Vide VARIANCE, No. 2, 3.

INDORSEE.

Vide BILL *of Exchange*, No. 1. INSOLVENT *Debtor*, No. 1. LIEN, No. 1.

INFANT.

Cannot be elected a burgess of *Portsmouth*, though not sworn in till of age. *Rex* v *Carter*. 226

Vide EJECTMENT, No. 2.

INFERIOR *Courts*.

1. Justification (to an action of assault and false imprisonment) by process out of an inferior court, stated, "that "the plaintiff below levied his plaint "in a plea of trespass on the case, "*for a cause of action arising within* "*the jurisdiction of the court*.—And "held good, *without* setting forth "*the cause of action*, or that the de- "fendant *became indebted within the* "*jurisdiction*." *Rowland* v. *Veale*. 18

2. Formerly nothing was presumed in favour of the regularity of their proceedings, nor could they be set right with a *taliter processum*: but their objections have of late years been over-ruled. *Rowland* v. *Veale*. *Page* 18

3. If the cause of action does not arise within the jurisdiction, the defendant must avail himself of it by plea in the court below; or, if not alledged in the plaint to be within the jurisdiction, he must bring error or false judgment. *Ibid.* 21

4. Where the *capias* (from the court below) is under process of *execution*, it needs not be shewn in the justification, *that the precept was returned*; otherwise, when it is under *mesne process*. *Ibid.* *Ibid.*

5. The court was held *from three weeks to three weeks*; and the writ was, to have the body at the *next court generally*: It is good, and a day certain need not be shewn. *Ibid.* 21

INFORMATION.

1. *One* information may, by *leave of the court*, be exhibited under the *Irish* statute 19 *Geo.* 2. *c.* 2. *sect.* 4. against *different* persons, and against the *same* persons, for usurping *different* franchises; and there is *no* necessity to *state* such leave upon the *record*. *Symmers* v. *Regem*. 489

Vide ARREST *of Judgment*, No. 1, 2. LIBEL, No. 1, 2, 3, 4. QUARTER SESSIONS, No. 1. PENALTY, No. 1. 6.

INFORMER.

Vide COSTS, No. 1. 5, 6, 7.

INSOLVENT *Debtor*.

1. An indorsee of a promissory note, payable three months after date, may be discharged under an insolvent act which takes place *before* the three months are expired. *Workman* v. *Leake*. 22

2. So may the obligor of a bond conditioned for payment of money at a future day, though the act took place *before* the day limited by the condition

tion for payment. *Paget* v. *Wheate.* (in a note.) *Page* 23

3. Under the ſtat. 16 *Geo.* 3. *c.* 38. a debtor ſhall not be diſcharged of any debt contracted *after* the 22d of *January* 1776, though it was contracted *before* the defendant's diſcharge. *Ernſt* v. *Sciaccaluga.* 527

INSPECTION.

1. Perſons empowered by ſtat. 3 *G.* 3. *c.* 15. to inſpect the entries of freemen, have a right to inſpect ALL books, papers, *&c.* in which the admiſſions of freemen are entered. *Schuldam* v. *Bunniſs.* 192

INSURANCE.

1. If a ſhip inſured *at* and *from Jamaica*, *warranted* to have ſailed on or before a certain day (with return of part of the premium, in caſe of convoy) ſail on or before the day from her *port of lading*, with all her cargo, *&c.* on board, to the uſual place of rendezvous at another part of the iſland, for the ſake of joining convoy there *ready*, it is a compliance with the warranty, though ſhe be afterwards detained there by an *embargo* beyond the day.—And though ſuch place of rendezvous be out of the *direct* courſe of the voyage, it is *no deviation*. *Bond* v. *Nutt.* 601

2. Upon a policy at and from ſuch a port to any other port or place whatſoever for *twelve* months, at 9 *l. per cent.* warranted free from capture, the riſk is *entire*; and therefore, if *once begun*, there ſhall be *no return* of premium. *Tyrie* v. *Fletcher.* 666

3. There are two *general* rules. 1. That wherever the riſk has *not begun*, to whatſoever cauſe it may be owing, the *premium* ſhall be *returned*. *Ibid.* 668

4. Secondly, That wherever the riſk has *once begun*, though it ceaſe immediately after, there ſhall be *no apportionment* or return of premium. *Ibid.*

5. In a policy upon a *life* for twelve months, with an exception of *ſuicide*, the riſk is *entire*; and if the party put an end to his exiſtence the *next inſtant*, there ſhall be *no* apportionment or return of premium. *Ibid.* *Page* 669

6. *Quære*, If in a policy upon a ſhip *at* and *from* ſuch a port, warranted to depart on a day certain, the riſk and contract are *not diviſible*; *viz. one* riſk during the ſhip's ſtay in port, and *another* after her departure on the day? 670

7. Upon a policy at and from *London* to *Halifax*, warranted to depart with *convoy* from *Portſmouth*, the contract and *riſk* are *diviſible*; *viz.* from *London* to *Portſmouth* is one contingency; from *Portſmouth* to *Halifax* with convoy, is another: Therefore, where the ſhip departed from *Portſmouth* without convoy, by which means the *ſecond* riſk did *not begin*, it was held there ſhould be a return of premium. 669

8. If a ſhip, warranted to ſail on or before a particular day, be prevented from ſailing by an embargo, the warranty is not complied with. *Hore* v. *Whitmore.* 784

9. A *warranty* inſerted in a policy of inſurance muſt be *literally* and *ſtrictly* complied with. *Pawſon* v. *Watſon:* 785

10. A *repreſentation* to the underwriter need only be *ſubſtantially* performed. *Ibid.* *Ibid.*

11. But if *falſe* in a *material* point, it will *avoid* the policy.—And in that caſe, a miſrepreſentation to the firſt underwriter will affect the policy with reſpect to all the ſubſequent underwriters. *Ibid.* 786—8, 9

12. Diſtinction exemplified.—In a life policy, if a man *warrants* another to be in *good* health, knowing he is *ill*, *that* will not avoid the policy, becauſe he takes the *riſk* upon *himſelf*. *Ibid.* 788

13. But if there is no warranty, and he ſays "the man is in *good health*," *knowing* him to be *ill*, or knowing *nothing* about his ſtate of health, it is a falſehood, that will avoid the policy. *Ibid.* 788

14. *Secus*, if not knowing whether the party is well or ill, he ſays, "he believes he is in good health." *Ibid.* *Ibid.*

Vide WAGER, No. 3. 9.

JOINDER *in Action.*

1. An action on ſtat. 3 *Geo.* 3. *c.* 15. for refuſing inſpection of corporation books will lie againſt the bailiffs, &c. of a borough jointly, if *more* than *one*; though the words of the ſtatute are in the ſingular number bail*iff*, &c. *Schuldham* v. *Buxniſs.* *Page* 192

JOINT-TENANTS.

Vide TENANTS *in common.*

JOURNALS.

1. *Copies* of the proceedings of parliament entered upon the journals are *evidence*, and need *not* be *ſtamped.* *Jones* v. *Randall.* 17

JOURNEYMAN.

1. Treſpaſs on the caſe lies by a maſter for ſeducing his journeyman from his work, as for any other ſervant. *Hart* v. *Aldridge.* 54
2. So, if he be employed only by the piece. *Ibid.* 55

JUDGMENT.

1. In debt for a penalty, for non-performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before the ſtat. 8 & 9 *Will.* 3. *c.* 11. but then it can ſtand only as a *ſecurity* for the *damages ſuſtained.* *Goodwin* v. *Crowle.* 357
2. So in caſes where the court of *Chancery* orders a judgment to be given as a ſecurity. *Ibid.* 359
3. If upon an information filed by the Attorney General againſt ſeveral defendants for a *ſeveral* offence, *all* the defendants be found guilty, a motion in arreſt of judgment by *all* is proper. *Rex* v. *Clarke.* 611, 12
4. *Secus*, where ſuch information (No. 3.) charges a joint offence, becauſe the Attorney General may enter a *noli proſequi* againſt one or more. *Rex* v. *Clarke.* *Ibid.*

Vide FRAUD, No. 4. JURORS and JURY, No. 1.

JURISDICTION.

1. If treſpaſs and falſe impriſonment be brought againſt a governor appointed by letters patent under the crown, for wrongfully impriſoning the plaintiff during the term of ſuch defendant's acting as governor, the king's courts in *England* can alone have juriſdiction: Becauſe ſuch governor is in the nature of a viceroy; and therefore *locally during his government*, no civil or criminal action will lie againſt him. *Moſtyn* v. *Fabrigas.* *Page* 172, 3
2. Such offence alſo (No. 1.) is a ſpecies of abuſe of the authority delegated to him by the letters patent: And therefore, cognizable only in the King's courts: For no queſtion concerning the ſeignory can be tried within the ſeignory itſelf. *Ibid.* *Ibid.*
3. If juriſdiction be given by ſtatute to a ſuperior court *of common law* to try a *new* offence created by ſtatute, the proceedings may be removed into *B. R.* by *habeas corpus*, *certiorari*, or writ of *error*, unleſs expreſsly taken away.—*Secus*, if the ſtatute preſcribes a *ſpecial* juriſdiction, *not known to the common law.* *Harley qui tam* v. *Hooker.* 524

Vide ABATEMENT, No. 1, 2. ERROR, No. 1, 2, 3.

JURORS *and* JURY.

1. Judgment upon a writ of enquiry ſet aſide, becauſe the jury were returned by the attorney for the plaintiff. *Baylis* v. *Lucas.* 112
2. With regard to the ſtriking out the twenty-four from a ſpecial jury, *vide* *Rex* v. *Hart.* 412

JUSTICE *of* PEACE.

Vide QUARTER-SESSIONS, No. 1. PARDON, No. 3. RATE, No. 1. 8.

JUSTIFICATION.

1. There may be caſes in which a governor of a garriſon may have a juſtification, in time of *war*, which he would

would not have in time of *peace*. *Moſtyn* v. *Fabrigas*. *Page* 173
2. Whatever is a juſtification in the place where the thing is done, ought to be a juſtification where the cauſe is tried. *Ibid.* 175
Vide ACTION, No. 2. INFERIOR COURTS, No. 1. 4.

K.

KING.

1. THE King may grant the duties of a port to a ſubject, in conſideration of repairing the port. *The mayor of Hull* v. *Horner*. 108
2. The King in council can no otherwiſe puniſh any of the governors of his foreign poſſeſſions, than by removing them, and taking away any commiſſions which they may hold, during his pleaſure. *Moſtyn* v. *Fabrigas*. 175
3. The King has a right to a legiſlative authority over a conquered country, till he has done ſome act that amounts to a waver of it. *Calvin*'s caſe, 7 *Rep*. 17. *b*. cited in *Campbell* v. *Hall*. 213
4. *Quære*, if the crown may not by its prerogative grant an exemption from being impreſſed? *Rex* v. *Tubbs*. 520, 1

L.

LANDLORD.

VIDE RENT, No. 3.

LATITAT.

1. By the general rule and courſe of the *King's Bench*, the *bill* is the *commencement of the ſuit*: And the *latitat*, except where it is replied to the ſtatute of limitations, or to avoid a tender, or where it is given in evidence to ſupport a penal action in point of time, is conſidered but as *proceſs*. *Foſter* v. *Bonner*. *Page* 454
2. Therefore the time of ſuing it out, except in the caſes above mentioned, is *immaterial*. *Ibid.* *Ibid.*
3. It may bear *teſte before* the cauſe of action. And if a treſpaſs or injury be proved before the bill filed, it is ſufficient. *Ibid.* 455
4. But in the excepted caſes above ſtated (No. 1.) the time of ſuing out a *latitat* is material. *Ibid.* 456
5. As where upon an action brought upon the ſtat. 8 *Geo*. 1. *c*. 19. (which directs all proſecutions upon it to be brought *before the end of the next term* after the offence committed) it was manifeſt upon the *face* of the *declaration* that it was out of time, the *memorandum* being of *Trinity* term, and the *declaration* ſtating that the defendant, after the *firſt* day of *Hilary* term and *before* the exhibiting the plaintiff's bill, *viz*. on the 27th of *January*, kept a lurcher: Yet upon proof at the trial, that the *latitat* was ſued out *within time*, it was holden ſufficient. *Ibid.* *Ibid.*
6. In all ſuch caſes, the defendant is entitled, as well as the plaintiff, to ſhew the true time of the *latitat* iſſuing. *Ibid.* *Ibid.*

LEASE.

1. If *void* againſt a remainder-man, cannot be ſet up by his acceptance of rent; and if only *voidable*, yet, acceptance of rent is not of itſelf a confirmation. *Jenkins* v. *Church*. 482
2. Of 2000 years, no man has it as a leaſe; but as a *term* to attend the inheritance. *Denn* v. *Barnard*. 595

LEGACY.

1. *Quære*, How far a court of common law has concurrent juriſdiction with the eccleſiaſtical court and courts of *Equity* in matters of legacy? *Atkins* v. *Hill*. 287
Vide ASSUMPSIT, No. 4, 5. EXECUTOR, No. 2, 3, 4.

LETTERS *Patent*.

1. Queſtions concerning the effect or extent of them, can only be tried in the King's courts. *Moſtyn* v. *Fabrigas*. 173

Vide JURISDICTION, No. 1, 2.

LETTERS.

Vide POST-OFFICE.

LIBEL.

1. Upon an information for writing and publiſhing a libel *of and concerning the King's government and the employment of his troops* (ſetting forth the libel *verbatim*) the words "*of and* "*concerning*" are a ſufficient *introduction* of the *matter* contained in the libel, and a ſufficient *averment* that it was written "of and concerning "the King's government and the "employment of his troops." *Rex* v. *Horne*. *Page* 672
2. The *giſt* of every *charge* of every *libel*, conſiſts in the *perſon* or *matter*, *of* and *concerning whom*, or *which*, the words are averred to be *ſaid* or *written*. *Ibid.* 679
3. All circumſtances neceſſary to conſtitute the crime, muſt be ſet out. *Ibid.* 683
4. Where the writing is ſo clear as to amount of itſelf to a libel, all foreign circumſtances introduced upon the record are unneceſſary. *Ibid.* *Ibid.*
5. Where the libel does not in itſelf contain the crime without *extrinſic* aid, ſuch extrinſic matter muſt be put upon the record by *averments*: If *new* matter, by way of *introduction*; if matter of *explanation* only, by way of *innuendo*. *Ibid.* 684
6. This doctrine illuſtrated at large. 682 to 689

LICENCE.

1. A rector gives a certificate appointing *A. B.* his curate, promiſing to pay him a ſalary, &c. The biſhop ordains him upon this title: This is a licence within the meaning of the canon law. *Martin* v. *Hind*. 443
2. At leaſt it is ſo, as between the rector and curate. *Ibid.* *Ibid.*

Vide CERTIFICATE, No. 2. CURATE, No. 1.

LIEN.

1. The indorſee of a bill of exchange who has received a certificate of navy bill as *his ſecurity* (though aſſigned to the drawee) for payment of the bill of exchange, has a lien on ſuch certificate in the hands of the drawee, to whom he (the indorſee) had ſent it. *Pierſon* v. *Dunlop*. *Page* 571
2. Whoever ſupplies a ſhip with neceſſaries has a treble ſecurity. 1. The perſon of the maſter. 2. The ſpecific ſhip. 3. The perſonal ſecurity of the owners. *Rich* v. *Coe*. 633

Vide FACTOR. VENDOR and VENDEE, No. 3.

LIMITATION.

1. The ſtatute of limitations is a *poſitive bar*. But there are caſes not within the ſtatutes, where the court has thought that a jury might preſume any thing to ſupport a length of poſſeſſion. *Eldridge* v. *Knott*. 215
2. Though the crown is not bound by the ſtatute of limitations, yet a grant may be preſumed from great length of poſſeſſion. *Ibid.* *Ibid.*
3. But there is no inſtance of ſetting up any length of time, within the limitation fixed by the ſtatute, as a *bar* to the demand. *Ib.* 216
4. In the caſe of tenants in common, if one is in poſſeſſion, and on demand by the co-tenant of his moiety, *denies to pay*, and *denies his title*, and continues in poſſeſſion; ſuch poſſeſſion is *adverſe*, and amounts to an *ouſter*; ſo that the ſtatute of limitations will run. *Doe* v. *Proſſer*. 218
5. Where a man deviſes his eſtate for payment of debts, a court of equity ſays (and a court of law would ſay) all debts barred by the ſtatute of limitations ſhall come in. *Freeman* v. *Fenton*. 548
6. If a ſtatute for allotting lands within a manor, direct all diſputed claims to be tried by a feigned iſſue, and *limit* the time of bringing it to *ſix months*, an action brought againſt a copyholder within time, and abated by his death, muſt be *revived* againſt the *heir*, *within ſix months* after the plaintiff *has notice of the deſcent*, though the heir had not been *admitted* till long after that time. *Knight* v. *Bate*. 738

Vide PRESUMPTION, No. 1, 2, 3, 4, 5.

LONDON.

1. Upon an act of parliament empowering *the mayor, aldermen, and commonalty in common council assembled*, to take certain steps for the compulsive purchase of lands wanted for a road; an order of sessions stated these steps to have been taken by the *mayor, commonalty and citizens*; and it was held bad: though the *latter* is the *name* of the *corporation at large*, and therefore in *fact* includes the *former* body. *Rex* v. *Croke*. *Page* 29
2. The liberties of *London*, are a *corporate*; *suburbs*, a *natural* denomination. *Jones* v. *Walker*. 628

Vide AUTHORITY. PRIVILEGE.

LORDS' ACT.

Vide ATTACHMENT, No. 1.

M.

MANDAMUS.

1. GRANTED to compel the warden of *Wadham* college to affix the common seal of the college to an answer of the fellows, *&c.* in *Chancery*, contrary to his own separate answer put in. *Rex* v. *Wyndham*. 377
2. Where there is no other legal specific remedy, the course must be by mandamus. *Ibid.* 378
3. Upon a *mandamus* to churchwardens to restore *L. C.* to the office of sexton, a return, that *L. C.* was not duly elected according to ancient custom; and that there is a custom for the churchwardens and inhabitants to *remove* at *pleasure*, and that *L. C.* was *removed* pursuant to such custom, is good. *Rex* v. churchwardens of *Taunton St. James*. 413
4. The court will not grant a *mandamus* to restore a person, where it is confessed he was *rightly* removed, though he had no notice at the time, to appear and defend himself. *Rex* v. *Mayor of Axbridge*. 523

MALICIOUS PROSECUTION.

Vide NEW TRIAL, No. 1.

MANSLAUGHTER.

If an officer in the impress service, fire *in the usual manner* at the *ballyaras* of a boat, in order to *bring her to*, and happen to kill a man, it is only *manslaughter*. *Rex* v. *Rowland Philips*. *Page* 830

MARRIAGE.

1. After a solemn declaration by a woman that she was married to a man, and that goods (in his possession) were his goods in her right; she shall never be allowed to say (at least against creditors), that she was not married to him, and that the goods were her sole property. *Mace* v. *Cadell*. 233.
2. MARRIAGE SETTLEMENT. *Vide* SETTLEMENT, No. 3.

MERCHANTS.

Vide FACTOR.

MINES.

Lead mines are not rateable to the poor within the stat. 43 *Eliz. c.* 2: therefore the *adventurers* are excused; but the lord who receives a *certain stipulated* benefit from the profits, is expressly charged to the land-tax, and is also liable to the poor's rate in respect of such profits; being visible real property within the parish. *Rowls* v. *Gells*. 453

MORTGAGE, MORTGAGOR, MORTGAGEE.

1. A mortgagee is a purchaser within the stat. 27 *Eliz. c.* 4: and therefore, a *voluntary* settlement made by the mortgagor, after marriage, is void as against him. *Chapman* v. *Emery*. 278
2. A mortgagor shall never be permitted to dispute the title of his mortgagee. *Goodtitle* v. *Bailey*. 601

Vide NOTICE, No. 1, 2.

MURDER.

Vide MANSLAUGHTER.

MUSICAL COMPOSITION.

1. Is within the ſtat. 8 *Ann. c.* 19. for the encouragement of learning, by veſting the copies of printed books in the authors or purchaſers of ſuch copies during the times therein mentioned. *Bach* v. *Longman.* *Page* 623
2. For it is a writing, though not in language, or letters. *Ibid.* *Ibid.*

N.

NEW TRIAL.

1. IN an action for a malicious proſecution, the jury found for the defendant, againſt evidence; but the court would not grant a new trial, as the ſuit was of a *criminal* nature. *Norris* v. *Taylor.* 37
2. A new trial will ſeldom be granted in caſes of perſonal torts for exceſſive damages. *Gilbert* v. *Burtenſhaw.* 230
3. It ought not to be granted merely for the ſake of turning the party round; but, where ſubſtantial juſtice cannot otherwiſe be obtained. *Goodtitle* v. *Bailey.* 601

Vide DAMAGES.

NON-RESIDENCE.

1. The ſtatute, againſt *non-reſidence*, 21 *Hen.* 8. *c.* 13. is a *remedial* law: And though the *general* words of the act, "that every ſpiritual perſon ſhall "*reſide in*, *at*, and *upon* his *benefice*," might, in the caſe of a rector, be ſatisfied by his reſiding any where upon the living; the conſtruction has been, that where there is a *parſonage houſe*, he muſt himſelf perſonally *reſide in it.* *Wilkinſon* v. *Allott.* 341
2. Reſidence in the pariſh, though within twenty yards of ſuch parſonage houſe, and though his ſervants ſleep in it, has been held not ſufficient. 2 *Brownlow*, 54. cited. *Ibid.* *Ibid.*
3. *Impoſſibility* however, will *excuſe*: as where from time immemorial there has been *no parſonage houſe.* *Ibid.* *Ibid.*
4. But in ſuch caſe (No. 3.) the proviſion of the ſtatute muſt be performed *cypres*: and therefore he muſt *reſide ſomewhere in the pariſh.* *Wilkinſon* v. *Allott.* *Page* 431

Vide PARSON, No. 1, 2.

NONSUIT.

1. Where a plaintiff is nonſuited, the defendant is entitled to coſts. Where the judgment is arreſted, each party pays his own coſts. *Cameron* v. *Reynolds.* 407
2. In treſpaſs againſt *ſeveral*, if *any* ſuffer judgment by *default*, the plaintiff need only give evidence to affect the reſt; and it is matter for the jury, whether the treſpaſs proved be the ſame as that confeſſed; but the plaintiff *cannot* be *nonſuited.* *Harris* v. *Butterley.* 483
3. In ejectment, where the leſſor of the plaintiff's own deed is ſet up againſt him, if colourable evidence of fraud or impoſition upon the plaintiff be given, ſuch fraud is a matter of fact to be left to the jury; and therefore a nonſuit would be wrong. *Goodtitle* v. *Bailey.* 599
4. So if there were proof that ſuch deed (No. 2.) were made under a miſtake, becauſe that would be equivalent to fraud. *Ibid.* 600

Vide COSTS, No. 6.

NOTICE.

1. If a road act (9 *G.* 3. *c.* 89) require notice in writing to be given to mortgagees of lands wanted, in order to compel them to aſſign their intereſt, it is not ſufficient in an order of ſeſſions to ſay, that *due notice* was given; but it ought to be ſtated to have been given in writing. *Rex* v. *Croke.* 30
2. Such defective notice (No. 2.) would not be cured by the appearance of the party. *Ibid.* *Ibid.*
3. If a ſettlement or other conveyance is *void* againſt a purchaſer (within the ſtat. 27 *El. c.* 4.) notice to ſuch purchaſer makes no difference. *Chapman* v. *Emery.* 280
4. S. P. *Doe* verſus *Routledge.* 711
5. But with reſpect to the *regiſter act*, 7 *Ann. c.* 20. though it is poſitively ſaid,

ſaid, that a regiſtered deed ſhall take place of an unregiſtered deed, equity will not ſet it aſide in favour of a party who knew of it at the time, becauſe he had that notice which the act of parliament intended he ſhould have. *Doe* v. *Routledge.* *Page* 711

6. When the poſſeſſion of a tenant is adverſe, it is not neceſſary to give him notice to quit, in order to ſupport an ejectment againſt him. *Doe* v. *Williams.* 622

Vide CORPORATION, No. 11. CURATE, No. 2, PARTNERS, No. 2. RATE, No. 8. SURPRISE.

NUDUM PACTUM.

A promiſe by a bankrupt, after the bankruptcy, to revive a debt due *before,* in conſideration of the creditors agreeing to take no dividend, is not *nudum pactum.* *Trueman* v. *Fenton.* 548

NUISANCE.

Vide CERTIORARI, No. 2.

O.

OATH.

1. UPON the principles of the common law, no particular form of oath is eſſential to be taken by a witneſs. *Atcheſon* v. *Everitt.* 389

2. Therefore, though the Chriſtian oath was ſettled in very early times, yet *Jews,* before their expulſion on the 18th of *Edward* the Firſt, were permitted, at common law, to be ſworn upon the Old Teſtament, and to give evidence in all caſes, criminal or civil. *Ibid.* 389—90

3. A Turk may be ſworn on the Alcoran, and give evidence on a criminal proſecution. *Ibid.* *Ibid.*

4. The teſtimony of a ſectary who refuſed to kiſs the book, but whoſe form of ſwearing was by opening the book, and lifting up his right hand, has been admitted in a civil action. 2 *Sid.* 6. cited. *Ibid.*

5. *Quære,* If perſons of ſuch ſect (No. 4.) might not be admitted as witneſſes in a proſecution for high treaſon? *Atcheſon* v. *Everitt.* *Page* 389—90

OFFICE and OFFICER.

1. The office of pariſh clerk is a *temporal* office; and though he be appointed by the miniſter, yet, if removed without ſufficient cauſe, a *mandamus* will lie to reſtore him. *Rex* v. *Warren.* 370

2. If the ſummoning bailiff, whoſe duty it is to ſummon jurors to try cauſes, take money of the inhabitants liable to ſerve, the court will grant an attachment againſt him. *Rex* v. *Whitaker.* 752

OVERSEERS.

Appointment of them on a *Sunday* quaſhed. *Rex* v. *Overſeers of Bridgewater.* 139

OWNERS and MASTER.

1. If *exorbitant* fees are taken by a Cuſtomhouſe officer from the *maſter* of a veſſel, upon his taking out a cocquet and bond, purſuant to the ſtat. 13 & 14 *Car.* 2. *c.* 11. ſect. 7; though the ſtatute impoſes the duty on the *maſter perſonally,* the *owners* may recover the *exceſs,* in *aſſumpſit for money had and received.* *Stevenſon* v. *Mortimer.* 805

2. Where a man pays money by his *agent,* which ought not to have been paid, *either* the *agent* or *principal* may bring an action to recover it back. *Ibid.* *Ibid.*

3. If money is miſpaid to a *known* agent, and an action brought againſt him for it, it is an anſwer to ſuch action, that he has *paid it over* to his principal. *Ibid.* *Ibid.*

Vide ASSUMPSIT, No. 10, 11, 12.

P.

PAPIST.

1. ONE ſeiſed of a real eſtate, bequeaths ſeveral pecuniary legacies,

gacies, and, as to ſome, directs they ſhall be paid to the full, whatever elſe, *debts excepted*, falls ſhort; and then ſays, "In order to raiſe money "for theſe payments, my eſtate of "*B.* muſt be ſold as ſoon as conve- "niently may be after my deceaſe. "*To this end*, I do appoint and em- "*power C.* and *D.* whom I make "my executors, to *ſell*, let, or ſet to "ſale, both my eſtates of *B.* and *E.*" Held, that a *Popiſh* creditor was entitled to his debt out of the *money ariſing by ſale of the teſtatrix's* real eſtate, according to the appointment of the will. *Foone* v. *Blount*. *Page* 464

2. The laws againſt Papiſts are not to be extended by inference beyond what the reaſons that gave riſe to them require. *Foone* v. *Blount*. 466

3. Where lands are deviſed to truſtees to be ſold for payment of particular ſums to certain perſons, ſome of whom are Papiſts, the ſtat. 12 *W.* 3. *c.* 4. does not prevent ſuch Papiſts from taking the ſaid legacies. *Ibid.* 468

4. A Popiſh creditor cannot take a leaſe for years; but he may have a claim upon ſuch leaſe, as aſſets. *Ibid.* *Ibid.*

PARDON.

1. There are *three* ways by which accomplices obtain a *right* to a pardon. *Firſt*, By approvement; *2dly*, By coming within the ſtatutes 10 & 11 *W.* 3. *c.* 20. *ſ.* 5. and 5 *Ann. c.* 31. *ſ.* 4.; *3dly*, by being entitled to it by the royal proclamation. *Rex* v. *Rudd*. 334

2. An accomplice, though not within any of the three foregoing caſes, may, if admitted a witneſs under the *practice* allowed, if he behaves fairly, and diſcloſes the whole truth, obtain a recommendation to mercy; but it reſts upon his being a perſon properly within the *uſage*, and upon his own behaviour in fully complying with the requiſite conditions. *Ibid.* 336

3. A juſtice of peace has no authority to ſelect whom he pleaſes, and to tell ſuch offender he ſhall be a witneſs. *Ibid.* *Ibid.*

PARSON.

1. A ſequeſtration of a benefice with cure is no excuſe for the non-reſidence of the incumbent; and therefore a leaſe thereof made by him, will by ſuch abſence be rendered void within the ſtat. 13 *Eliz. c.* 20. *ſ.* 1. *Doe* v. *Meares*. *Page* 129

2. The want of a parſonage houſe is no excuſe for his reſiding *out* of the pariſh. *Wilkinſon* v. *Allot*. 427

PARTNERS.

1. If one of two partners commit a ſecret act of bankruptcy; the other partner may for a valuable conſideration, and without fraud, diſpoſe of the partnerſhip effects; and though he himſelf afterwards become bankrupt, the aſſignees under a joint commiſſion cannot maintain trover againſt the *bonâ fide* vendee of ſuch partnerſhip effects. *Fox* v. *Hanbury*. 449

2. If partners diſſolve their partnerſhip, perſons who deal with either, *without notice* of ſuch diſſolution, have a right againſt both. *Ibid.* *Ibid.*

3. Reſpecting the rights of partners againſt each other, and of third perſons againſt them, *vide ibid.* 449

4. The aſſignees under a commiſſion of bankruptcy againſt one partner, can only be tenants in common of an undivided moiety, ſubject to all the rights of the other partner. *Ibid.* *Ibid.*

5. On a bankruptcy between partners, they are entitled as againſt each other to the balance of accounts. *Hague* v. *De Silva*. 469

6. If two are partners, as *attorneys* and *conveyancers*, and *one* receive money to be laid out on mortgage; the *other* is anſwerable for the amount, though his partner gave only his own *ſeparate receipt* for it. *Willet* v. *Chambers*. 814

Vide BANKRUPT, No. 12.

PEER of PARLIAMENT.

May be ſued in *B. R.* by original bill. *Goſling* v. *Ld. Weymouth*. 844

PENAL ACTIONS.

Are *civil* ſuits. *Atcheſon* v. *Everitt*. 589

PENALTY.

1. The penalty of 10 *s. per* ton, impoſed by ſtat. 8 *G.* 3. *c.* 38. for giving a falſe account of goods in a boat, is not to be calculated upon the groſs weight of goods contained in the boat; but only upon the *difference* between the weight or quantity given in, and the weight or quantity contained in the boat, *Minors* v. *Hough ton.* *Page* 585

2. On an information and verdict againſt *ſeveral* perſons for obſtructing a cuſtomhouſe officer contrary to ſtat. 8 *G.* 1. *c.* 18. *ſ.* 25, *each* defendant is *ſeparately* liable to the penalty impoſed by the act. *Rex* v. *Clark.* 610

3. Where an offence made penal by ſtatute, is, in its *nature*, *ſingle*; *one* ſingle penalty only can be recovered, though ſeveral join in committing it: But if the offence be in its nature *ſeveral*, each offender is *ſeparately* liable to the penalty. *Rex* v. *Clark.* 610

4. Thus the offence by ſtat. 1 & 2 *P.* & *M.* *c.* 12. (by impounding a diſtreſs in a wrong place) though done by many, is ſtill but *one* act, and ſhall be ſatisfied by *one* forfeiture. So under ſtat. 5 *Ann.* *c.* 14. killing a hare, is but *one* offence in its nature; but the ſtat. 8 *G.* 1. *c.* 18. *ſ.* 25. relates to an offence in its nature *ſeveral.* *Ibid.* 612

5. If a perſon not preſent were to have *procured* ſuch offence to be done; he would be liable to the penalty. *Ibid.* *Ibid.*

6. A perſon can commit but one offence on one day, againſt the ſtat. 29 *Car.* 2. *c.* 7. "by exerciſing his ordinary "calling on a *Sunday.*" And if a juſtice of peace convict him of more than one penalty for the *ſame* day, it is an exceſs of juriſdiction for which an action will lie before the convictions are quaſhed. *Crepps* v. *Durden.* 640

PLEADING.

1. Plea to a bond conditioned for payment of money, that it was given as an indemnity againſt another bond, and that the plaintiff has not been damnified, is *bad.* *Meaſe* v. *Meaſe.* *Page* 47

2. If to an action by a ſheriff, againſt a bailiff's ſurety, upon a bond for the performance of an indenture of covenant, to execute all warrants, and to pay over all money received by him, a plea of performance generally be put in; if the replication ſtate a *particular* warrant, &c. to the ſaid bailiff, and that he neglected to return it, &c. the plaintiff muſt conclude with an *averment.* *Sayre* v. *Minns.* 575

3. Other objections to the above plea (No. 2.) over-ruled. *Ibid.* *Ibid.*

4. *Riens in arrere* is a good plea to an action of *debt* for rent. *Warner* v. *Theobald.* 588

5. *Secus*, in an action of covenant: admitted *arguendo.* *Ibid.* *Ibid.*

6. To a *ſci. fa.* on a judgment, the defendant can plead nothing in bar, which he might have pleaded to the original action. *Cook* v. *Jones.* 728

7. In a *qui tam action* in *B. R.* for inſuring lottery tickets contrary to ſtat. 16 *G.* 3. *c.* 24. if a former action has been brought againſt the defendant in *C. B.* for the ſame offence, which he had leave to compound; the court will not ſtay the proceedings upon *his* affidavit of the above facts, but he muſt *plead* them ſpecially. *Harrington qui tam* v. *Johnſon.* 744

Vide COVENANT, No. 2. 4. DECLARATION. LIBEL. RENT, No. 1, 2. VARIANCE, No. 1. 4, 5.

POLICY *of Inſurance.*

Vide INSURANCE.

POOR.

1. *Quære*, How far perſonal property is to be rated to the poor. *Rex* v. *Churchwardens of Andover.* 550

Vide RATE.

POSTMASTER GENERAL.

1. Is not liable *perſonally* for the value of a bank-note ſtolen, by one of the *ſorters* of the Poſt-office, out of a letter delivered into the office: *Whitfeld* v. *Lord Le Deſpencer.* 754 to 766

2. He is not like a common carrier. *Ibid.* 764

3. Caſe,

3. Caſe, where the ſtatute makes him liable for his own fault only. *Whitfeld* v. *Lord Le Deſpencer*. *Page* 765

POST-OFFICE.

1. A poſt-maſter is bound to deliver all letters to the inhabitants *in a poſt town*, at their reſpective places of abode, at the rate of poſtage eſtabliſhed by act of parliament. *Smith* v. *Powdich*. 182
2. *Old-ſtreet* is within the *ſuburbs* of the city, being connected to it by a ſtreet of *contiguous* buildings before the ſtat. 9 *Ann. c.* 10: therefore (though it is not within the *liberties*) the Penny poſt-office is entitled only to one penny for the carriage and delivery of a letter there. *Jones* v. *Walker*. 624
3. Its eſtabliſhment. *Whitfeld* v. *Lord Le Deſpencer*. 763
4. Statutes reſpecting it. *Ibid.* 764—766

POWER.

1. A power to appoint by *deed* executed in the preſence of two witneſſes, is ill executed by a *will*. *Secus*, had the power been to appoint by any *writing* or *inſtrument*, or other *general* term. *Earl of Darlington* v. *Pulteney*. 260
2. There is no diſtinction between equitable and legal executions of powers. *Ibid.* 266
3. When the power is executed for a meritorious conſideration, the preciſe form need not be ſtrictly purſued. *Ibid.* 267
4. In the conſtruction of powers originally equitable, the courts of law ought to follow equity; but if they are originally legal, the courts of *Equity* muſt follow the law. *Ibid.* 266, 7
5. *A.* having a power to limit an eſtate to the uſe of ſuch *child* or *children* of the ſaid *A.* and for ſuch eſtate or eſtates as ſhe the ſaid *A.* ſhould direct, limit, &c. and having two daughters, *as to one moiety* of the ſaid eſtate, appoints it to the uſe of her *eldeſt* daughter *B.* for life, with remainder to the firſt and other ſons of her ſaid daughter in tail male, remainder to the daughters of the ſaid *B.* in tail general, remainder to her youngeſt daughter *C.* for life, with remainder to her firſt and other ſons, &c. remainder to the daughters of the ſaid *C.* in like manner, remainder to the right heirs of the eldeſt daughter *B*: and ſo *vice verſâ*, as to the *other moiety*. Held, that ſuch appointment is an *exceſs* of *A*'s power as far as reſpects the limitation to her *grandchildren*, but good, as to the limitation to her daughters for life. *Adams* v. *Adams*. *Page* 651. 657
6. One, under a power reſerved in his marriage ſettlement to leaſe for 21 years *in poſſeſſion*, but not in *reverſion*, grants a leaſe to his only daughter for 21 years, to *commence from the* DAY *of the date*. Adjudged a *good* leaſe. *Pugh* v. *Duke of Leeds*. 714

PRACTICE.

1. One who is in cuſtody at the ſuit of the plaintiff, in the *Marſhalſea Court*, cannot be removed by *habeas corpus ad reſpondendum*, to anſwer to the plaintiff for the *ſame* debt in a new action in the *King's Bench*. *Meſſum* v. *Gardner*. 116
2. Where the defendant has not put in bail in time, whereby the bail-bond becomes forfeited, and afterwards gives notice that he will put them in, in order to ſtay proceedings on the bail-bond, the plaintiff may except to ſuch bail, and it will not be a waver of the aſſignment. *Boldero* v. *Gray*. *Ibid.* 769

PREROGATIVE.

Vide KING.

PRESCRIPTION.

By a lord of a manor for toll of all goods landed *within the manor* in conſideration of *repairing a wharf* within the manor, is good; though the preſcription is laid more extenſive than the conſideration alleged. *Caton* v. *Smith*. 47

PRESENTMENT.

Vide CERTIORARI, No. 4. TRAVERSE, No. 1.

PRESUMPTION.

1. A grant or charter from the crown (which ought to be by matter of record) may, under circumſtances, be preſumed, though within time of legal memory; and poſſeſſion for 350 years was held by the court a ſufficient ground of preſumption, to be left to a jury. *Mayor of Hull* v. *Horner*. *Page* 102

2. Though the record be not produced, nor any evidence given of its being loſt; yet, under *circumſtances*, it may be left to the conſideration of a jury, or a court of *Equity*, whether there is not a ſufficient ground to preſume a charter. *Ibid.* 110

3. *Mere length of time*, ſhort of the period fixed by the ſtatute of limitations, and *unaccompanied* with any *circumſtances*, is not of itſelf a ſufficient ground to preſume a releaſe, or *extinguiſhment* of a *quit-rent*. *Eldridge* v. *Knott*. 214

4. A preſumption from mere length of time which is to ſupport a right, is very different from a preſumption to defeat a right. *Ibid.* 216

5. *Thirty-ſix* years *ſole* and uninterrupted *poſſeſſion*, by one *tenant in common*, without any account given to, or demand made, or claim ſet up by the other, or his repreſentatives, was held ſufficient ground for a jury to preſume an actual ouſter of ſuch co tenant. *Doe* v. *Proſſer*. 217

Vide LIMITATION.

PRINCIPAL and AGENT.

Vide AGENT. OWNERS and MASTER, No. 2, 3.

PRINCIPAL and SURETY.

Vide BANKRUPT, No. 13.

PRIVILEGE.

1. What facts are not ſufficient to ſhew that the watermen of the Lord Mayor of *London* are privileged from being impreſſed. *Rex* v. *Tubbs*. 512

2. But though not exempted, it would be an abuſe of the right to preſs them, if they were in the act of rowing the Lord Mayor in his barge. *Ibid.* 518

PROCESS.

In *B. R.* if the plaintiff prove an injury *before the bill filed*, though *after the latitat returned*, it is ſufficient; for, by the general courſe of the court, the bill is the commencement of the ſuit; and the *latitat*, except where it is replied to the ſtatute of limitations, or to avoid a tender, or where it is given in evidence to ſupport a penal action in point of time, is conſidered but as *proceſs*. *Foſter* v. *Bonner*. *Page* 454

Vide ARREST: — CORPORATION, No. 3.

PROHIBITION.

1. Denied to the court of Admiralty, where the matter ſuggeſted neither appeared on the face of the proceedings, nor was certified by affidavit. *Caton* v. *Burton*. 330

2. Denied to the Eccleſiaſtical court *after ſentence*, where the defendant below (who now applied for it) had ſet up ſeveral claims reſpecting tithes, but had ſuffered them to be tried there. *Full* v. *Hutchins*. 422

3. Where matters, triable at common law, ariſe *incidentally* in a cauſe, and the Eccleſiaſtical court has juriſdiction in the principal point, the court will not grant a prohibition to ſtay trial, unleſs they proceed to try contrary to the courſe of the common law. *Ibid.* 424

4. Where matters are eſſentially triable at common law, if the party come *before* ſentence, the court will grant it *for the ſake of the trial*: But if the party ſubmit to trial, he is afterwards *too late*. *Ibid.* 424

5. A prohibition lies *after ſentence*, where it appears on the face of the libel or proceedings that the Eccleſiaſtical court has *no cognizance of the cauſe*; *Secus*, if, there be only a defect of trial. As where the plaintiff has grounded his libel on a cuſtom, he ſhall not, after it is found againſt him, obtain a prohibition. *Ibid.*

Ibid.

Vide CONTRACT, No. 2.

PROMISSORY NOTE.

Vide DECLARATION, No. 5.

PURCHASE. PURCHASER.

Vide FRAUD.

Q.

QUAKER.

1. A Quaker's *affirmation* is admiſſible in an action of debt, upon the bribery act 2 G. 2. *c.* 24. *Atcheſon* v. *Everitt.* *Page* 382
2. The origin of the ſect of Quakers. *Ibid.* 388

QUARTER-SESSIONS.

May proceed by information on ſtat. 5 *Eliz. c.* 4. *ſect.* 39. for exerciſing a trade without having ſerved a ſeven years apprenticeſhip. *Farren qui tam* v. *Williams.* 369

Vide NOTICE, No. 1, 2. RATE, No. 1.

QUIT-RENT.

Vide PRESUMPTION, No. 3.

QUO WARRANTO.

1. The court will grant an information in the nature of a *quo warranto*, where the right depends on a point of doubtful law, in order to its being finally determined. *Rex* v. *Sir John Carter.* 58
2. Under what circumſtances the court might refuſe it, though applied for within twenty years. *Ibid.* 59
3. *Vide* alſo, as to this point, *Rex* v. *Binſtead.* 75

Vide CORPORATION. INFORMATION.

R.

RATE.

1. ON appeal to a poor's rate, on the ground of particular perſons or particular property being omitted in the rate, the ſeſſions ought not to quaſh the whole rate, but to amend it in thoſe particulars. *Rex* v. *Inhabitants of Ringwood.* *P.* 328
2. *Quære.* How far perſonal property is rateable to the poor under the ſtat. 43 *El. c.* 2? *Ibid.* *Ibid.*
3. A leſſee (under the crown) of iron mines, is rateable to the poor for the profits ariſing from *lot* and *cope*, which are duties paid him by the adventurers, without riſk on his part. *Rowls* v. *Gells.* 451
4. The poor's rate is not a tax on the land, but a perſonal charge in reſpect of the land. *Ibid.* 452
5. In general the farmer or occupier, and not the landlord, is liable to the tax. *Ibid.* 453
6. The grantee of the navigation of the river *Ouze*, is rateable to the poor of the pariſh of *Cardington*, in reſpect of the tolls ariſing from a ſluice *erected there*, though he himſelf reſides, and the tolls are collected *elſewhere*. *Rex* v. *Cardington.* 521
7. If *A.* rent a quantity of land, together with a mineral *ſpring* ariſing therefrom, at a groſs yearly rent, he is rateable to the poor for the whole of ſuch rent; though the annual value of the mere land, is only in proportion of 2 to 8 of the reſerved rent. *Rex* v. *Miller.* 619
8. If upon an order of ſeſſions, adjudging that certain perſons ought to be added to a rate, and ordering the rate to be amended accordingly, the ſeſſions *omit* to ſtate, that ſuch perſons had *notice*, or appeared and were heard, it is fatal. *Rex* v. *Churchwardens of Andover.* 564
9. Whether, and in what manner perſonal property is rateable to the poor. *Ibid.* 564
10. The court will not quaſh a poor rate unleſs it be unequal upon the face of it. *Rex* v. *Hardy.* 579
11. Rating the occupiers of lands and the poſſeſſors of perſonal property in different proportions, will not make a rate unequal on the face of it. *Ibid.* 580

Vide USAGE, No. 3.

READERSHIP.

If the rector of a pariſh, by certificate to the biſhop, appoint *A. B.* curate of

of the ſaid pariſh till otherwiſe provided of ſome eccleſiaſtical preferment: The readerſhip of the pariſh is not an eccleſiaſtical preferment, within the meaning of ſuch certificate. *Martin* v. *Hind.* *P.* 437

RECOGNIZANCE.

The form of one given in the *King's Bench* by a peereſs, to anſwer an indictment for felony in the Houſe of Lords. 284

RECOVERY, *Common.*

1. What is a ſufficient deſcription of the premiſes to make it good. *Maſſey* v. *Rice et al.* 346
2. There is not ſo much certainty of deſcription required in a recovery, as in an *adverſe* action. *Ibid.* 349—51
3. One deviſes to his daughter an *expreſs eſtate tail*; but afterwards ſays, "ſuch deviſe ſhall be *void as to inheritance of heirs, if ſhe die without children*, and the eſtate ſhall deſcend to his heir male." A recovery ſuffered by the daughter is good, though ſhe afterwards die without iſſue. *Driver ex dim. Edgar* v. *Edgar.* 379
4. A *ſecret feoffment* under a *naked* poſſeſſion, is not ſufficient to ſupport a common recovery by tenant in tail in remainder. *Doe* v. *Horde.* 702
5. A feoffee to the mere intent of becoming tenant to the *præcipe*, is an inſtrument for one purpoſe of *form* only. *Ibid.* 702 and 704

RELEASE.

Though a deed be in the ſhape of a releaſe, if there are ſufficient words, it may operate as a grant, in order to make it good. *Goodtitle* v. *Bailey.* 599

Vide PRESUMPTION, No. 3.

REMAINDER.

1. A deviſe "to the uſe of all and every "the daughter and daughters of the "teſtatrix, and to the heirs of their "*body and bodies*, ſuch daughters, "if more than one, to take as tenants in common, and not as joint "tenants, and for default of ſuch "iſſue, to the uſe of the *right heir* of "the teſtatrix." Held, "that the "daughters take *croſs remainders*." *Wright* v. *Holford.* *Page* 31
2. The preſumption of law is in favour of raiſing croſs-remainders between *two only*; and againſt raiſing croſs-remainders between *more than two*. But the preſumption in *either* caſe, may be rebutted by manifeſt circumſtances of *intention* apparent on the face of the will. *Pery* v. *White.* 777
3. The ſame rule of conſtruction (No. 2.) laid down in *Phipard* v. *Manſfield.* 797

RENT.

1. Plea to avowry for rent, that defendant pulled down a ſummer-houſe, whereby the plaintiff was deprived of the uſe thereof, without ſaying that he was *expelled*, or put out of the ſame, is inſufficient; being a *mere treſpaſs*, and no *eviction*. *Hunt* v. *Cope.* 242
2. But if the plaintiff had pleaded *eviction*, the facts ſtated might have been ſufficient for the jury to have found a verdict in his favour. *Ibid.* 243
3. The mere acceptance of rent by a landlord, for occupation ſubſequent to the time when notice to quit expired, is not *of itſelf* a waver on the part of the landlord of ſuch notice; but it is to be left to the jury *quo animo* the rent was received. *Doe ex dim Cheny* v. *Batten.* *Ibid.*
4. Acceptance of ſingle rent is a waver of the double rent, given by ſtat. 4 *Geo.* 2. and acceptance of rent ſince the forfeiture of a leaſe (by 4 *Geo.* 2. *c.* 28. *ſect.* 2.) ſeems to have been held a waver of ſuch forfeiture; for it is a penalty. *Ibid.* 245, 6, 7
5. A ſubſequent agreement may by relation operate to make a reſervation of rent from the beginning. *M'Leiſh* v. *Tate.* 781—4

Vide COVENANT, No. 7. LEASE, No. 1.

REPLEADER.

1. The court will not grant a repleader but where compleat juſtice may be anſwered. *Symmers* v. *Regem.* *Page* 510

2. Where the iſſue is immaterial and a repleader granted, the parties muſt begin from the point of pleading where the immateriality begins. *Ibid.* *Ibid.*

REPUBLICATION.

Vide WILL.

RESIDENCE.

Vide PARSON.

REVOCATION.

1. The *mere* act of *cancelling* a will, is *no* revocation, unleſs it be done *animo revocandi.* *Burtenſhaw* v. *Gilbert.* 52

2. A ſubſequent will, though the jury find it to contain a *different* diſpoſition from a former, if the particulars of that difference be unknown, is no revocation of ſuch former will. *Harwood* v. *Goodright.* 87

3. There muſt be an *inconſiſtent* diſpoſition, in the whole, or in part, of the latter deviſe, to revoke the former: And if *in part*, it is a *revocation* in *part* only. *Ibid.* 90

4. If the jury do not find wherein the difference conſiſts, between a former and latter deviſe, the court cannot preſume it. *Ibid.* 91

5. Making a *ſecond* will, is not *in itſelf* a *revocation*, of a *former* ſubſiſting will. *Ibid.* *Ibid.*

6. If a ſubſequent will, either virtually or expreſſly revoking a former will, be deſtroyed, the former, if ſubſiſting, is revived. *Ibid.* 92

7. One, having by will, duly atteſted, deviſed *all his lands to truſtees*, in *truſt* to *ſell*, &c. and out of the intereſt of the monies ariſing by ſuch ſale, to pay an annuity to his wife, legacies to his children, &c. &c. afterwards *obliterates*, *interlines*, and *alters all* the *bequeſts* directed to be paid out of ſuch monies, without atteſting ſuch alterations, &c. and without *republiſhing* his will. Held that the deviſe to the truſtees to *ſell* was not *revoked.* *Sutton* v. *Sutton.* *Page* 812. 814

8. *Quære*, If the ſeveral bequeſts ſo altered, &c. are revoked. *Ibid.*

RIOT.

If perſons riotouſly aſſembled demoliſh the doors and windows of a houſe, and, having thus obtained an entrance, deſtroy the goods and furniture, the hundred are anſwerable in an action on the ſtat. 1 G. 1. c. 5. ſ. 6. for the damage done to the furniture, as well as to the houſe. *Ratcliffe* v. *Eden.* 485

Vide INDICTMENT, No. 2.

ROADS.

Vide HIGHWAY.

ROMAN CATHOLICS.

Vide PAPISTS. TOLERATION.

RULES *of Court.*

1. Shall not be made the inſtruments of fraud. *Gillman* v. *Hill.* 142

2. A rule of court giving a *ſpecific relief*, is a bar to an action for the ſame cauſe; unleſs in a caſe, where, by law, the party is entitled to two different remedies; as upon an illegal arreſt. *Cameron* v. *Reynolds.* 406, 7

S.

SCIRE FACIAS.

VIDE PLEADING, No. 6.

SEAMAN.

Vide USAGE, No. 1, 2.

SMUGGLED GOODS.

Vide ACTION, No. 5.

SERVANT,

Vide JOURNEYMAN.

SETT-OFF.

1. In covenant, unliquidated damages arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set-off. *Howlet* v. *Strickland*. *Page* 56

2. In an action brought by the assignees of a bankrupt, for money due to the bankrupt, the defendant may plead a set-off of money due from the bankrupt to him: but if some of the counts are for debts arising since the bankruptcy, he cannot plead a set-off as to those counts. *Ridout*, &c. v. *Brough*. 133

Vide COVENANT, No. 1.

SETTLEMENT.

1. One, *after* marriage, makes a settlement of certain premises upon himself for life, remainder to his wife for life, remainder to their issue in tail; and three years afterwards, mortgages the premises to *B.*, who was told that there was such a settlement. The settlement is void, (as against the mortgagee,) within the stat. 27 *Eliz. c.* 4. *Chapman* v. *Emery*. 278

2. A remote reversion in fee, was held to pass under *general words* in an act of parliament, by way of settlement in execution of marriage articles, though the reversion was not particularly in contemplation at that time; the words being sufficient to carry it, and the intention being to include *all* the estate of the testator. *Freeman* v. *The Duke of Chandos*. 360

3. *A.*, (being indebted,) by settlement *before* marriage, in consideration of marriage and his wife's portion, which was supposed to amount to more than his debts, conveyed all his real estate, and likewise his *household goods*, (the real estate not being thought adequate,) in trust for himself for life, remainder to his wife for life, remainder to his first and other sons in strict settlement. The settlement was *approved* by a *Master in Chancery*, and the goods enumerated in a schedule. *A.*, after the marriage, *continued in possession* of the goods: afterwards *a creditor at the time of the settlement*, having obtained judgment, took them in execution. Held, the settlement was good against creditors, and the trustees entitled to the possession of the goods. *Cadogan* v. *Kennet*. *Page* 432

4. But if the settlor in such case (No. 3.) had let the house and furniture, reserving one rent for the house, and another for the furniture; or if the rent could be apportioned, the creditors would be entitled to the share of such rent reserved, or to such apportionment of it, in respect of the goods. *Ibid.* 436

5. So, if money in the funds were included under such settlement, the creditors would be entitled to the dividends during the debtor's interest. *Ibid.* *Ibid.*

6. *Vide* the rule made in the above cause (by consent) agreeable to the above principles. (No. 4 & 5.) 437

Vide FRAUD.

SHERIFF.

1. Actions for breach of duty of the office of sheriff, must be brought against the *high sheriff*, though by default of the under sheriff or bailiff. *Cameron, et al.* v. *Reynolds*. 403

2. An action does not lie against the sheriff, upon a promise to execute a bill of sale to the plaintiff's nominee. *Ibid.* 406

3. The legal and proper mode of compelling a sale by the sheriff, is by writ of *venditioni exponas*. *Ibid.* *Ibid.*

SHIP,

Vide LIEN.

SLANDER.

1. The *colloquium* was of the death of *D.*, and the words were, "I am "thoroughly convinced that you are "guilty (*innuendo*, of the *death* of "*D.*) and rather than you should

"go without a hangman, I will hang "you." Alſo another count was, "You are *guilty*, (*innuendo*, of the "murder of *D.*") Held good after verdict. *Peak* v. *Oldham.* *Page* 276

2. "Guilty of the death," neceſſarily imports a charge of murder. *Aliter*, had it only been that he was the the *cauſe of the death*; for a man may innocently be the cauſe of another's death. *Ibid.* *Ibid.*

STATUTES.

1. It is a general rule that ſubſequent ſtatutes, which only add accumulative penalties, do not repeal former ſtatutes. *Rex* v. *Jackſon.* 297-8

2. In remedial caſes, the conſtruction of ſtatutes is extended to other caſes within the reaſon or rule of them. *Atcheſon* v. *Everitt.* 391

3. But where it is a hard poſitive law, and the reaſon is not very plain to be ſeen, it ought not to be extended by conſtruction. *Ibid.* *Ibid.*

4. Strong words in the enacting part of a ſtatute, may extend it beyond the preamble. *Pattiſon* v. *Banks.* 543

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17.	*c.* 46.	791.

SURPRISE.

1. If a rector, by certificate to the bishop, appoint a person his curate, with a promise to allow him a salary and to continue him in such office of curate, till he is preferred, or lawfully removed for some fault, if he afterwards remove him *without cause*, and the curate bring an action for his salary, the rector shall not justify such removal by an accusation of irregularity in the plaintiff's morals or conduct, produced for the first time, by surprise, at the trial of the cause. *Martin* v. *Hind.* 441

2. In an action for money had and received, brought to try, Whether the defendant was entitled to take certain fees from the plaintiff under an act of parliament, if the parties go to trial upon an apprehension that that was the only question to be tried, the plaintiff shall not be permitted to surprise the defendant at the trial, by starting another ground upon which to recover a *Norfolk* groat. *Stevenson* v. *Mortimer*. *Page* 807

T.

TENANT *in Common*.

1. THE possession of one, shall be said to be the possession of the other, when he holds possession as *such*, and receives the rents and profits on account of both. *Fisher et al.* v. *Prosser*. 219

2. A devise of lands to *three*, "*equally*," is a *tenancy in common*. *Den* v. *Gaskin*. 660

TOLERATION.

1. All the consequences of the act of toleration 1 *Wm. & Mary*, *c.* 18. ought to be pursued with the greatest liberality in ease of the scrupulous consciences of dissenters on the one hand; but so, as those scruples of conscience should not be prejudicial to the rest of the King's subjects. *Atcheson* v. *Everitt*. 388

2. For a scruple of conscience entitles a party to indulgence and protection, so far as not to suffer for it, but it is of consequence that the subject should not suffer too. *Ibid.* *Ibid.*

3. A dissenter from the church of *England*, is not guilty of a crime, barely by entertaining such religious opinion. *Ibid.* 393

TOLL.

1. Distinction between toll *thorough* and toll *traverse*. For the *first*, a consideration must be laid; for toll traverse, it need not; it is implied. *Colton* v. *Smith*.

2. The additional toll to be paid by waggons overweight, must be according to the progressive proportions named in stat. 14 *Geo.* 3. *c.* 82. *s.* 2. not a *gross* charge upon the overweight at the highest additional toll incurred. *Chamberlain et al.* v. *Songhurst*. *Page* 365

Vide PRESCRIPTION. ACTION, No. 14. DISTRESS. No. 1.

TRAVERSE.

1. A presentment in a court leet may be removed into the court of *B. R.* and traversed *there*. *Rex* v. *Russell*. 458, 60

TRESPASS, *vi et armis*.

1. Trespass and false imprisonment lies in *England* by a native of *Minorca*, against the governor of that island, for an injury of that nature, committed in *Minorca*. *Mostyn* v. *Fabrigas*. 161

2. Trespass does not lie against a pound-keeper merely for *receiving* cattle, though the taking were tortious; for he is bound to keep whatever is brought to him. *Secus*, if he goes beyond his duty, and assents to the trespass. *Baskin* v. *Powell*. 476

TRIAL.

1. There is a *formal* and a *substantial* distinction as to the *locality* of trials. *Mostyn* v. *Fabrigas*. 176

2. The *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. As in ejectment. *Ibid.* *Ibid.*

3. *Quære*, If such *substantial* distinction of locality, does not exist also, with regard to matters that arise *out* of the realm? As if two persons were to fight in *France*, and both happening to be in *England*, one should bring an action of assault against the other; because the breach of the peace, which must be laid in the declaration, is merely *local*, though the trespass against the person is transitory. *Ibid.* *Ibid.*

4. The *formal* distinction arises from the *mode* of trial, *viz.* by *jury*. *Ibid.* *Ibid.*

5. This latter extends to all cases that arise abroad, with a distinction, however,

however, between *tranſitory* and *local* actions. *Ibid.* *Page* 176
6. *Vide* this diſtinction exemplified and illuſtrated. 177—181

TROVER.

1. Does not lie againſt an executor for a converſion by his teſtator. *Hambly* v. *Trott*, adminiſtrator. 371
2. It is in *form* a fiction, in ſubſtance founded on property. *Ibid.* 374
3. Does not lie by the aſſignees under a joint commiſſion of bankrupt, againſt the vendee of goods diſpoſed of, *bonâ fide*, by one partner ſome time *before his own* bankruptcy; but *after* a ſecret act of bankruptcy by the other partner. *Fox* v. *Hanbury*. 445
4. What is a ſufficient affidavit to hold to bail in trover. *Charter* v. *Jacques*. 529
5. If money and a horſe are given in exchange, for another horſe *warranted ſound*, which was unſound at the time, *trover* will not lie to recover the horſe given in exchange, becauſe the *property* is *altered*. *Power* v. *Wells*. 814

Vide BAIL, No. 6.

TRUST and TRUSTEE.

1. If land be deviſed to perſons, in aid of perſonal eſtate, for payment of debts, &c. and the perſonal eſtate proves deficient, the deviſees, when they have paid this charge, become truſtees for the perſon entitled to the ſurplus; *viz.* for the reſiduary deviſee, if there be one; if not, for the heir at law; for it is a reſulting truſt. *Hart* v. *Knott*. 46
2. An eſtate in truſt *merely for the benefit of ceſtui que truſt*, ſhall not be ſet up againſt him. *Ibid.* *Ibid.*

Vide DEVISE, No. 2. 15. EJECTMENT, No. 1.

U.

USAGE.

1. THE power of impreſſing ſeafaring men, &c. is founded on *immemorial uſage*; and there may be a right of exemption on the ſame foundation. *Rex* v. *Tubbs*. 512
2. What facts have been held inſufficient to prove ſuch an exemption. *Ibid.* *Ibid.*
3. Where it has been the uſage in a pariſh to rate perſons to the poor for their *ſtock in trade within the pariſh*, ſuch perſons are liable in reſpect thereof. *Rex* v. *Hill*. 613-619
4. Whether uſage is material under the ſtat. 9 *Ann. c.* 10, and 4 *Geo.* 2. *c.* 33. *Jones* v. *Walker*. 624

USES.

Though lands are comprehended in the general ſweeping clauſe of a deed of ſettlement (to certain uſes), yet, if no uſe be declared of them, they deſcend to the heir. *Moore* v. *Magrath*. 9

Vide DEED.

USURY.

1. If a tradeſman ſell goods at three months credit; and ſtipulate, in caſe the money is unpaid, that the vendee ſhall allow him a halfpenny an ounce *per* month, till he diſcharges the debt; this allowance, though above the legal rate of intereſt, yet, being the *uſage* in that trade, and the contract being a *bonâ fide* ſale, is not uſurious. *Otherwiſe*, if it be merely a *colour* to cover a *loan*, and to evade the ſtatute. *Floyer* v. *Edwards*. 112
2. Where it is in the power of a borrower of money to pay the principal within a limited time, without intereſt; upon non-payment, the reſervation of a larger ſum than the ſtatute allows, is no uſury. *Ibid.* 115
3. An uſurious contract muſt be proved as laid. *Carliſle qui tam.* v. *Trears*. 671
4. On a rule to vacate a judgment confeſſed, and to ſtay proceedings on the *ſci. fa.* upon an allegation that the conſideration of the warrant of attorney was uſurious, the court

will direct an iſſue to try the uſury, and enlarge the rule in the mean time. *Cook* v. *Jones.* *Page* 727-8

5. Uſury cannot be pleaded to a *ſcire facias* on a judgment. *Ibid.* *Ibid.*

6. If the ſubſtance of a contract be a borrowing and lending, a ſlight colourable contingency only, will not take it out of the ſtatute of uſury. *Richards qui tam* v. *Brown.* 770

7. If *A.* upon a loan of money, ſtipulate to have *half the profits* upon a reſale of goods to be purchaſed by the borrower, which profits *exceed* 5 *l. per cent.* and *A.*'s principal is not riſked, *quære*, if ſuch contract be *not uſurious? Jeſtons* v. *Brooke.* 793

V.

VARIANCE.

1. BETWEEN a bond and the declaration upon it. *Moſtyn* v. *Fabrigas.* 178

2. Variance by putting underſtood for underſtood, in an indictment for perjury, held not material. *Rex* v. *Beach.* 229

3. The true diſtinction ſeems to be, that, *where the omiſſion or addition of a letter does not change the word, ſo as to make it another word, the variance is not material.* *Ibid.* *Ibid.*

4. Variance, in a declaration of *aſſumpſit* for a ſum given by a judicature eſtabliſhed by ſtat, 4 & 5 *Phil. & Mary*, by deſcribing the ſtat. as the 4th of *P. & M.* is fatal. *Rann* v. *Green.* 474

5. Declaration againſt the defendant as aſſignee of *all* the eſtate, *&c.* in certain premiſes; evidence that he is aſſignee of *part* only, is a fatal variance. *Hare* v. *Cator.* 765

Vide CUSTOM, No. 2.

VENDOR and VENDEE.

1. If a vendor actually takes upon himſelf to deliver the goods to the vendee, he ſtands to all riſks; but if the vendee order a particular mode of conveyance, the vendor is excuſed, and the vendee muſt ſtand the any loſs that may happen. *Farr* v. *Bayle.* *Page* 23

2. Thus, when the vendee wrote in theſe words, "I beg you will ſend "them by *land-carriage*, as they are "detained a long time at *Briſtol* be"fore they arrive": The vendor delivered them to the book-keeper of the *Birmingham* carrier, which was *the only mode of ſending them by land carriage*; and the goods were loſt: adjudged that this was a good delivery to the vendee. *Ibid.* *Ibid.*

3. But, while the goods are *in tranſitu*, the vendor has ſuch a lien upon them, as to be permitted to get them back, if the vendee, in the mean time, has become a bankrupt. *Ibid.* *Vide alſo* *Birkett* v. *Jenkins*, *Eaſt.* 11 G. 3. *cited*, *Ibid.* 295

4. If vendor ſell goods by ſample, to be delivered to the vendee within a month, and take earneſt; and within a month ſend them by his ſervant to the premiſes, where, part being unloaded, the reſt are diſtrained for toll; *the delivery is complete*, ſo as to entitle the *vendee* to bring *treſpaſs* for the ſeizure. *Blakey* v. *Dinſdale.* 604

5. So it was, to all honeſt purpoſes, in reſpect of *third* perſons, the moment the vendor had delivered the goods to his own ſervant, to carry to the vendee. *Ibid.* *Ibid.*

VENUE.

1. When an action is brought in *England*, upon a deed dated in foreign parts, a place in *England* muſt be alleged in the declaration, *pro formâ*. *Moſtyn* v. *Fabrigas.* 178-9

2. Every tranſitory action may be laid in any county in *England*, though the matter ariſe beyond the ſeas. *Ibid.* 181

3. The plaintiff was allowed to bring back the venue to *London*, (where it had been at firſt laid,) though the cauſe had gone down to trial, and had

had been a *remanet* for want of jurors. *Bruckſhaw* v. *Hopkins.* *Page* 409

4. The court will not change the venue (to the county in which the cauſe of action aroſe) where an impartial or ſatisfactory trial cannot be had; as in an action for words ſpoken at an election. *Petyt* v. *Berkeley.* 510

5. The venue may be changed after an order for time to plead, though upon the terms of pleading iſſuably; but *not* after ſuch an order where the terms are to plead iſſuably, *and take ſhort notice of trial at the firſt ſittings.* *Ibid.* 511

VERDICT.

1. A verdict will not aid, where the giſt of the action is not laid in the declaration. But it will cure ambiguity. *Avery* v. *Hoole.* 826

2. The want of a bill in the *King's Bench*, and the want of an original in the *Common Pleas*, are both cured after verdict. *Foſter* v. *Bonner.* 455

Vide SLANDER, No. 1.

VISITOR.

1. Is only to decide private diſputes between the members of the college; and not a ſuit by a third perſon againſt the whole body. *Rex* v. *Wyndham.* 378

2. So, where an eſtate is in the college, and they are to act in a truſt, the viſitor cannot meddle in a matter which is the ſubject of ſuch truſt. *Ibid.* *Ibid.*

Vide COLLEGE.

W.

WAGERS.

1. AN action lies to recover money won upon a wager, "Whe-"ther a decree of the court of *Chan-*"*cery* would be reverſed or not, on "appeal to the Houſe of Lords?"—Unleſs there be any fraud, or circumſtances that ſhew the motive to have been immoral or corrupt. *Jones* v. *Randall.* *Page* 37

2. If the wager had been made with one of the Lords, or one of the Judges, or with a counſel or attorney, *in the cauſe*, it would have been illegal. *Ibid.* 39, 40

3. An agreement, that in conſideration the plaintiff had agreed to pay the defendant 20*l.* at the next port, the defendant undertook that the ſhip ſhould ſave her paſſage to *China* that ſeaſon; and in caſe ſhe did not, he would pay to the plaintiff 1000*l.* at the end of one month after her arrival in the river *Thames*, is a *wagering* policy within the ſtat. 19 *G.* 2. *c.* 37. though the plaintiff had ſome goods on board, liable to ſuffer by the loſs of the ſeaſon; but there was no reference (in the agreement) to property. *Kent* v. *Bird.* 583

4. An action will not lie upon a *voluntary wager* between two *indifferent* perſons, on the *ſex* of a third perſon, who has appeared and acted as a man. 1. Becauſe ſuch enquiry tends to *indecent evidence* 2. Becauſe it tends to *diſturb the peace* of the individual, and of *ſociety.* *Da Coſta* v. *Jones.* 729 736

5. Wagers in general are allowed, unleſs where reſtrained by ſtatute. *Ibid.* 734

6. But where a wager is laid upon a ſubject that tends to a breach of the peace, or a violation of chaſtity, or that is *contra bonos mores*, it is unlawful. *Ibid.* 735

7. So, if it affect the intereſt or feelings of a third perſon. *Ibid.* *Ibid.*

8. But wherever a queſtion ariſes upon a real matter of right, it ſhall be tried, though the intereſt of third perſons, not parties, may be affected by it. *Ibid.* 736

9. A policy, on the *ſex* of a perſon, is a wagering policy within the ſtat. 14 *G.* 3. *c.* 48. by which "all in-"ſurances upon lives, or any other "event or events, without intereſt "in

" in the parties, are made null and " void." *Roebuck* v. *Hammerton*. *Page* 737

WARRANT of ATTORNEY.

1. The court will not ſet it aſide on account of its being given by a defendant in cuſtody without an attorney preſent on his part, if executed by the defendant purpoſely with a view to cheat the plaintiff. *Gillman* v. *Hill*. 141
2. It is *good*, if given by one in cuſtody under an *execution*, though no attorney be preſent on his behalf. For the rule of *Eaſt*. 15 *Car*. 2. does not extend to it. But if the party had been prevailed on to acknowlege it, *&c*. for more than was due, the court would give relief under circumſtances. *Fell* v. *Riley*. 281

WARRANTY,

Vide ASSUMPSIT, No. 17. INSURANCE. TROVER, No. 5.

WILLS.

1. One, having made his will and a *duplicate* thereof, delivers the duplicate to another perſon. Afterwards he makes another will, by which he revokes all former wills, and at the ſame time he *cancels that part* of the former will which was in his own cuſtody. Before his death, he ſends for an attorney to make a *third* will; but is ſenſeleſs before the attorney arrives. After his death, the firſt and ſecond will are found together in a paper, *both cancelled*; but the duplicate of the firſt is found *uncancelled* amongſt his other deeds and papers. The act of cancelling the *ſecond* will, does not ſet up the duplicate of the firſt. *Burtenſhaw* v. *Gilbert*. 49
2. Where there are *duplicates* of a will, one in the teſtator's cuſtody, the other not; his cancelling the one in his cuſtody, is an effectual cancelling of both. *Ibid*. *Ibid*.
3. One having made his will, and deviſed all his freehold and copyhold lands to certain uſes, afterwards purchaſes other copyholds, which he ſurrenders thus: " To the uſes *de-* " *clared* or to be declared by his laſt " will and teſtament." This amounts to a *republication*, and the newly purchaſed copyholds ſhall paſs to the uſes of the will. *Heylyn* v. *Heylyn*. *Page* 139
4. When a man republiſhes his will, the effect is, that the terms and words of the will ſhould be conſtrued to ſpeak with regard to the property he is ſeiſed of at the date of the republication, juſt the ſame as if he had had ſuch additional property at the time of making his will. *Ibid*. 139
5. There is no republication in equity, that is not ſo in law. *Ibid*. *Ibid*.
6. One, having by will deviſed *all* the *reſidue* of his eſtate, of what kind or quality ſoever to *W. P. afterwards* purchaſes copyhold lands, and ſurrenders them to ſuch uſes as he *ſhall* by his laſt will declare, limit, and appoint. He afterwards makes a codicil, and thereby *ratifies* and confirms all and every the gifts, deviſes, and bequeſts in his ſaid will, *except* what he had *altered* by the codicil; and deſires the codicil may be annexed to, and taken as part of his will to all intents and purpoſes. This amounts to a republication of the will, ſo as to make the after purchaſed copyhold lands paſs by the reſiduary deviſe. *Doe* v. *Davy*. 158

WITNESSES.

1. If a party wants the teſtimony of witneſſes whom he cannot compel to attend, the court may put off the trial from time to time, till the other party conſents that depoſitions ſhall be taken where they are. *Moſtyn* v. *Fabrigas*. 174
2. A ſervant or clerk, who has embezzled money or notes of his maſter's, is an admiſſible witneſs (provided he has a releaſe) againſt the perſon who received ſuch money or notes from him,

him, on an action for money had and received, brought by his master to recover the amount. *Clarke* v. *Shee*. *Page* 199

3. A tenant in possession is not a good witness to prove his landlord's possession, or to support his title, because it is to uphold his own possession. *Doe* v. *Foster*. 621

Vide AFFIDAVIT, No. 1. ATTORNEY, No. 2, 3, 4. BANKRUPT, No. 2, 3.

WORDS.

1. Courts of justice are to construe the words of parties, so as to *effectuate* their *deeds*, and *not* to *destroy* them; more especially where the words themselves *abstractedly* may admit of either meaning. *Pugh* v. *Duke of Leeds*. 725

2. The word "from," may, in the vulgar use, and even in the strict propriety of language, mean either *inclusive* or *exclusive*. *Ibid.* *Page* 717-25

3. Therefore, where tenant for life, with a *power* to lease in *possession* and *not* in *reversion*, granted a lease to his only daughter for twenty-one years, to commence "*from* the DAY of "the DATE," the court held, that the parties understood and used the word "from" in that sense, which would make their deed effectual, and accordingly adjudged it a lease in possession. *Ibid.* *Ibid.*

WRITS.

Where a writ is taken out in the Vacation, and tested the last day of the Term, you cannot contradict the fiction, *so as to invalidate the writ*; but for any other purpose (such as taking a debt out of the statute of limitations) you may. *Mostyn* v. *Fabrigas*. 178

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